accession 23923

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 226.

SANFORD S. SMALL, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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UNITED STATES CIRCUIT COURT,

DISTRICT OF MINNESOTA.

Pleas before the Honorable, the Judges of the Circuit Court of the United States of America, for the District of Minnesota, for the June term of said Court, held in the city of St. Paul, in said District, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 108th year. 1

SANFORD S. SMALL,

vs.

NORTHERN PACIFIC RAILROAD COMPANY.

Be it remembered that on this 11th day of December, 1882, came the complainant above named, by Rea, Woolley & Kitchel and J. M. Shaw, his solicitors, and filed in the Clerk's office of the said Court, his return from the District Court of Hennepin County, said return being in the words and figures following, to-wit: 2

RETURN FROM STATE COURT.

STATE OF MINNESOTA, } ss. County of Hennepin. } District Court, Fourth Judicial District. 3

SANFORD S. SMALL, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

SUMMONS FOR RELIEF. 4

The State of Minnesota to the above named Defendant:

You are hereby summoned and required to answer the complaint of

the plaintiff in the above entitled action, which is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint on the subscribers, at their office, in the city of Minneapolis, in the
5 county of Hennepin and State aforesaid, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in the complaint.

Dated April 11th, A. D. 1882.

REA, WOOLLEY & KITCHEL,
Plaintiff's Attorneys,
Minneapolis, Minn.

6

STATE OF MINNESOTA,)
) ss.
County of Ramsey.)

I hereby certify and return that at the city of Saint Paul, County and State aforesaid, on the 19th day of April, A. D. 1882, I served the summons and complaint hereto attached, upon the within named—the Northern Pacific Railroad Company—personally, by handing to and leaving with Hermann Haupt, General Manager of said railroad, a true and cor-
7 rect copy thereof.

Dated this 19th day of April, A. D. 1882.

Sheriff's fee, service, $1.40.

FRED REICHTER,
Sheriff of Ramsey County, Minn.
By MARION HANSON,
Deputy.

8

9

CIRCUIT COURT

OF THE

UNITED STATES.

DISTRICT OF MINNESOTA.

STATE OF MINNESOTA, } ss.
County of Hennepin. }

DISTRICT COURT,
Fourth Judicial District.

SANFORD S. SMALL,
Plaintiff.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Defendant.

COMPLAINT.

Plaintiff complains of defendant, and alleges:

That said defendant was at all the times hereinafter mentioned and now is a corporation duly created, organized and existing under and by virtue of the laws of the United States of America; that heretofore, to-wit, on the first day of March, A. D. 1880, said corporation, defendant, was seized and possessed in fee simple of the following described real estate, situate, lying and being in the county of Traill, Territory of Dakota, to-wit: Sections three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33) and thirty-five (35), in township one hundred and forty-five (145), of range fifty-six (56), and

Sections one (1) and thirteen (13), the east half (E. ½) of section three

(3), the east half (E. ½) of section nine (9), the north half (N. ½) of section five (5), the west half (W. ½) of section twenty-one (21), the west half of northwest quarter (N. W. ¼) and west half of southwest quarter
14 (S. W. ¼) of section twenty-five (25) and northeast quarter (N. E. ¼) of section twenty-nine (29) in township one hundred and forty-four (144) of range fifty-five (55), and

Sections three (3), five (5), seven (7), nine (9), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-seven (27), twenty-nine (29), thirty-one (31) and thirty-three (33) in town one hundred and forty-six (146) of range fifty-five (55), and

Sections three (3), five (5), seven (7), nine (9), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five [25],
15 twenty-seven [27], twenty-nine [29], thirty-one [31], thirty-three [33] and thirty-five [35], and the west half [W. ½] of northwest quarter [N. W. ¼], and the south half of section eleven [11] and the south half of section thirteen [13] in township one hundred and forty-four [144] of range fifty-six [56], and

Sections one [1], three [3], five [5], seven [7], nine [9], eleven [11], thirteen [13], fifteen [15], nineteen [19], twenty-one [21], twenty-three [23], twenty-five [25], twenty-seven [27], twenty-nine [29], thirty-one [31] and thirty-three [33], in township one hundred and forty-six [146]
16 of range fifty-six [56], and

Sections one [1], three [3], five [5], seven [7], nine [9], eleven [11], thirteen [13], fifteen [15], seventeen [17], nineteen [19], twenty-one [21], twenty-three [23], twenty-five [25], twenty-seven [27], twenty-nine [29], thirty-one [31], thirty-three [33] and thirty-five [35] in township one hundred and forty-five [145], of range fifty-five [55].

That on said day to-wit, The said first day of March, 1880, said plaintiff and said defendant made and entered into a contract whereby said defendant bargained, sold and agreed to convey to said plaintiff by good and sufficient warranty deeds at the times and in the manner, and for the
17 consideration hereinafter stated, all of the foregoing described land; that said contract was entire and inseparable for the purchase by plaintiff and sale by defendant of the entire tract of land embraced in the foregoing description, to the end and for the purpose of the mutual benefits to be derived by plaintiff and defendant as hereinafter set out.

That the terms and conditions of said contract for the purchase and sale of said described lands so made and entered into by said plaintiff and defendant were as follows, to-wit:

Said corporation, defendant, agreed to sell to said plaintiff all of said
18 lands above described at the price of two and a half dollars [$2.50] per acre, except that portion of said lands lying in said township one hundred and forty-four [144], range fifty-six [56], the price of which was fixed in and by said contract at two and 75-100 dollars [$2.75] per acre in con-

sideration of the undertakings of the plaintiff hereinafter set forth. Said plaintiff agreed then and there to pay said defendant the aforesaid prices for said land and assume said undertakings which are hereinafter set out. It was then and there agreed by and between said parties, plaintiff and 19
defendant, that said described lands were to be paid for in the preferred stock of said corporation, defendant, at the par value thereof; that said plaintiff should make such payments of stock to said defendant from time to time as he, the said plaintiff, was able to procure the same, provided said purchase price of said lands should be fully paid by said plaintiff within a reasonable time from the date of said contract.

That whenever and as often as said plaintiff was able to and did make payments as aforesaid on account of the purchase price of said lands, said defendant was to convey to said plaintiff, his heirs and assigns, so much of said 20
described lands as such payment or payments paid for at the prices per acre hereinbefore stated. That in consideration of said agreement of said defendant to sell and convey said land to said plaintiff as aforesaid, and at the request of said defendant, said plaintiff agreed to enter upon said lands and lay out a new town to be situated as nearly as practicable in the centre of said described lands; to proceed at once to erect in said town, by him to be laid out, a hotel of sufficient capacity to accommodate from thirty to fifty guests; to erect a store building in said town and start and establish therein a grocery store for the convenience of settlers; and also to erect a 21
building for the accommodation of a post office and procure the establishment of a post office in said new town by the proper authorities; to break one hundred acres of land on each of five sections of said described land during the breaking season of 1881. And said plaintiff further agreed in consideration of said defendant's said agreement to sell and convey to him said lands as aforesaid, to enter upon said lands at his, plaintiff's own proper cost and expense, survey and take field notes of so much of said described lands as at date of said agreement had not been surveyed and of which no field notes had been taken, to-wit: fifty thousand [50,000] 22
acres of said described lands; to devote all his time, until the said entire tract was conveyed as aforesaid to plaintiff, to the advertising of said lands and the region and locality in which they are situate for the purpose of inducing immigration thereto, and to the sale of said lands in small tracts to actual settlers.

That then and there at the time and place of making said contract of purchase and sale, defendant by its duly authorized agent marked on the plats of lands of said defendant in the office of the land department of said defendant all the lands hereinbefore described as sold to said plaintiff. 23
That thereafter, to-wit, on the 30th day of April, 1880, under and by virtue of said contract, and pursuant to its provisions, said plaintiff paid said defendant on account of the purchase price of said described lands, in its preferred stock at the par value thereof, twenty-eight thousand eight

hundred and three and forty one-hundredths dollars [$28,803.40]. And said defendant then and there pursuant to said contract and the provisions thereof on its part to be performed, by its warranty deed duly executed
24 and delivered, conveyed to the plaintiff the following described lands, the same being part of said above described tract, embraced in said contract of purchase and sale, to-wit: Sections three [3], five [5], seven [7], nine [9], eleven [11], thirteen [13], fifteen [15], seventeen [17], nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33) and thirty-five (35), in township one hundred and forty-five (145), of range number fifty-five [55], the same being the amount of said lands paid for and covered by said payment at the price fixed in and by said contract. That thereafter,
25 to-wit, on the 30th day of June, A. D. 1880, the said plaintiff under and by virtue of said contract and pursuant to its provisions paid said defendant on account of the purchase price of said described lands embraced in said contract in its preferred stock at the par value thereof the sum of twenty-five thousand five hundred and seventy-two and 45-100 dollars [$25,572.45], and said defendant then and there pursuant to said contract and the provisions thereof on its part to be performed by its warranty deed duly executed and delivered, conveyed to the plaintiff the following described lands, the same being a part of said described tract embraced in said contract of purchase and sale, to-wit:

26 Sections three (3), seven (7), nine (9), eleven (11), fifteen (15), seventeen (17), nineteen (19) and twenty-five (25), in township one hundred and forty-five (145) north, of range fifty-six (56), and said defendant then and there, at the request of the plaintiff, by its warranty deed duly executed and delivered, conveyed the following described lands, the same being part of said described tract, embraced in said contract of purchase and sale, to E. H. Steele, to-wit:

Sections five (5), twenty-one (21), twenty-three (23), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33) and thirty-five (35), in
27 township one hundred and forty-five (145) north, of range fifty-six (56). Said lands so on said 30th day of June, A. D. 1880, conveyed as aforesaid to said plaintiff and at plaintiff's request to the said Steele, being the amount or portion of said lands embraced in said contract of sale, paid for by said payment of ($25,572.45) twenty-five thousand, five hundred and seventy-two and 45-100 dollars, at the prices fixed in and by said contract of purchase and sale.

That thereafter, to-wit, on the 31st day of July, A. D. 1880, said plaintiff under and by virtue of said contract, and pursuant to its provisions
28 paid said defendant on account of the purchase price of said described lands embraced in said contract in its preferred stock at the par value thereof, the sum of nineteen thousand, one hundred and forty-six and 40-100 ($19,146.40) dollars, and said defendant then and there pursuant

to said contract and the provisions thereof on its part to be performed by its warranty deed duly executed and delivered, conveyed to plaintiff the following described lands, the same being part of the hereinbefore described lands, embraced in said contract of purchase and sale, to-wit: 29
Sections three (3), five (5), seven (7), nine (9), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-nine (29) and thirty-one (31), in township one hundred and forty-six (146) north, of range fifty-five (55), and then and there at plaintiff's request by its warranty deed duly executed and delivered, conveyed to E. H. Steele, the following described lands, the same being a portion of the hereinbefore described lands embraced in said contract of purchase and sale, to-wit: Sections twenty-seven (27) and thirty-three (33), township one hundred and forty-six (146) north, of range fifty-five (55). Said lands so conveyed on said 31st day 30
of July, A. D. 1880, to said plaintiff, and at plaintiff's request to said Steele, being the portion or amount of said described lands, embraced in said contract of purchase and sale, paid for by said payment of nineteen thousand one hundred and forty-six and 40-100 dollars ($19,146.40) purchase money at the prices fixed in and by said contract.

That thereafter, to-wit, on the 11th day of August, A. D. 1880, said plaintiff under and by virtue of said contract and pursuant to its provisions paid said defendant on account of the purchase price of said described land embraced in said contract, in its preferred stock at the par value thereof, the sum of one thousand, three hundred and twenty dollars ($1,- 31
320.00), and said defendant then and there pursuant to said contract and the provisions thereof on its part to be performed, by its warranty deed duly executed and delivered, conveyed to said plaintiff the following described lands the same being part of the hereinbefore described lands embraced in said contract of purchase and sale, to-wit:

The west half (W. ½), of northwest quarter (N. W. ¼) and west half (W. ½) of southwest quarter (S. W. ¼) of section eleven (11). The north half (N. ½) of section thirteen (13), in township one hundred and forty-four (144), range fifty-six (56), the same being the portion or 32
amount of said lands embraced in said contract of purchase and sale paid for by said payment of purchase money at the price of said lands fixed in and by said contract.

That thereafter, to-wit, on the fifth day of October, A. D. 1880, said plaintiff under and by virtue of said contract and pursuant to its provisions, paid said defendant on account of the purchase price of the aforesaid described lands embraced in said contract in its preferred stock at the par value thereof the sum of fifteen thousand and four hundred dollars ($15,400), and the said defendant then and there pursuant to said contract 33
and the provisions thereof on its part to be performed by its warranty deed duly executed and delivered, conveyed to said plaintiff the following described lands, the same being part of the hereinbefore described lands

embraced in said contract of purchase and sale, to-wit: Sections twenty-one (21), twenty-three (23), and thirty-three (33), and southeast quarter (S. E. ¼) of section eleven (11) in township one hundred and forty-four
34 (144), range fifty-six (56), and said defendant then and there at plaintiff's request, by its warranty deed duly executed and delivered, conveyed to E. H. Steele the following described lands, the same being part of the aforesaid described lands embraced in said contract of purchase and sale, to-wit:

Sections fifteen (15), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-five (35) and south half (S. ½) of section thirteen (13) in township one hundred and forty-four (144), range fifty-six (56.)

Said lands so conveyed on said 5th day of October, A. D. 1880, to
35 plaintiff, and at plaintiff's request to said Steele, being the part or portion of said described lands embraced in said contract of purchase and sale, paid for by said payment of $15,400.00 purchase money, at the prices of said land fixed in and by said contract.

That thereafter, to-wit, on the 15th day of October, A. D. 1880, said plaintiff, under and by virtue of said contract and pursuant to its provisions, paid said defendant on account of the purchase price of the aforesaid described lands, embraced in its said contract, in its preferred stock, at the par value thereof, the sum of four thousand, seven hundred and twenty
36 dollars ($4,720.00), and the said defendant then and there, pursuant to said contract and the provisions thereof on its part to be performed by its warranty deed duly executed and delivered, conveyed pursuant to said contract and at plaintiff's request to Edward H. Steele, the following described lands, the same being part of the hereinbefore described lands embraced in said contract of purchase and sale, to-wit: Sections three (3), five (5) and seven (7) in township one hundred and forty-four (144), range fifty-six (56), the same being the part or portion of the aforesaid described lands embraced in said contract of purchase and sale, paid for by said payment of four thousand, seven hundred and twen-
37 ty dollars purchase money, at the price of said lands fixed in and by said contract.

That thereafter, to-wit, on the 30th day of October, A. D. 1880, said plaintiff, under and by virtue of said contract, and pursuant to its provisions, paid said defendant on account of the purchase price of the aforesaid described lands embraced in said contract, in its preferred stock, at the par value thereof, the sum of thirty thousand, nine hundred and twenty dollars (30,920.00), and the said defendant then and there, pursuant to said contract and the provisions thereof on its part to be performed by its
38 warranty deed duly executed and delivered, conveyed to said plaintiff the following described lands, the same being part of the hereinafter described lands embraced in said contract of purchase and sale, to-wit: Section seventeen (17) and the west half (W. ½) of section nineteen (19), township

one hundred and forty-four (144), range fifty-six (56), and said defendant then and there, at plaintiff's request and pursuant to said contract by its warranty deed duly executed and delivered, conveyed to Edward H. Steele, the following described lands, the same being part of the aforesaid 39
described lands embraced in said contract, to-wit:

Section nine (9) and the west half (W. ½) of section thirty-one (31), township one hundred and forty-four (144), range fifty-six (56); also sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17,) nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-nine (29), thirty-one (31), and thirty-three (33), in township one hundred and forty-six (146), range fifty-six (56), said lands so conveyed on said 30th day of October, A. D. 1880, to said plaintiff, and at said plaintiff's request to said Steele, being the part or por- 40
tion of the aforesaid, herein described lands embraced in said contract paid for by said payment of said thirty thousand, nine hundred and twenty dollars ($30,920.00) purchase money at the prices fixed in and by said contract.

That thereafter, to-wit, on the 18th day of February, A. D. 1881, plaintiff, under and by virtue of said contract and pursuant to its provisions, paid said defendant on account of the purchase price of the aforesaid described lands, embraced in said contract, in its preferred stock at the par value thereof the sum of two hundred and twenty dollars ($220.00), and
the said defendant then and there pursuant to said contract and the pro- 41
visions thereof on its part to be performed by its warranty deed, duly executed and delivered, conveyed to said plaintiff the following described lands, the same being part of the hereinbefore described tract of land embraced in said contract, to-wit: the east half (E. ½) of the southwest quarter (S. W. ¼) of section eleven (11), in township one hundred and forty-four (144), range fifty-six [56], the same being the part or portion of said purchased tract paid for by said payment of $220.00, at the price fixed in said contract.

That at the time and times plaintiff made each and all of the fore- 42
going payments on account of the purchase price of said lands, under said contract, and in accordance with its terms and conditions, said defendant without suggestion, interposition or demand whatever of plaintiff in regard thereto, selected from the entire tract embraced in said contract as aforesaid the part and parts or portion and portions thereof conveyed as aforesaid to plaintiff, and at his request to said Edward H. Steele, in consideration of and at the time and times of each and all of said payments respectively. That a short time after making said last payment on account
of the purchase price of said lands as aforesaid, to-wit, on the first day of 43
March, A. D. 1881, plaintiff applied to the agent of said defendant having charge of the sale and conveyance of its lands for the conveyance to him (plaintiff) of certain of the lands of said described purchased tract not

theretofore conveyed pursuant to said contract upon the payment to defendant of the purchase price thereof according to the terms of said contract, and was then and there informed by said agent of said defendant that said
44 defendant refused to survey the remaining unconveyed portion of said described purchased lands, or any part thereof to plaintiff under or by virtue of said contract and at the price therein agreed upon, and utterly and absolutely refused longer to be bound by said contract or any of its provisions, and said agent then and there stated to the plaintiff that the grounds of said refusal were that the contract aforesaid had not been reduced to writing.

That said plaintiff, relying upon the good faith of defendant, and relying upon its avowed intent and purpose to carry out and fulfill said contract according to its terms and provisions, had, previous to the refusal
45 as aforesaid of said defendant to convey to him, the said plaintiff, under said contract the portion of said lands purchased by said contract as hereinbefore set forth remaining unconveyed, according to the terms thereof, had at great inconvenience and expense prepared for the payment of the full amount of the purchase price of said purchased lands, remaining unpaid.

And plaintiff further alleges that relying upon the honesty, fair-dealing and good faith of the defendant in making and entering into said contract of purchase and sale, and relying upon its promises therein made, and
46 upon its expressed intent to fulfill all the provisions of said contract on its part to be performed, he, the said plaintiff, with all due diligence and within the times specified in said contract did and performed all the acts and provisions of said contract on his part to be done and performed.

That pursuant to the provisions of said contract on his part to be performed in the summer of 1880, he, said plaintiff, entered upon said purchased tract, and at his own proper cost and expense laid out and established the town of Hope, situate near the centre of said tract, and now a flourishing village of several hundred inhabitants.

47 That the said plaintiff pursuant to the provisions of said contract on his part to be performed during the summer season of 1880, erected in said town of Hope a hotel having capacity to accommodate fifty guests at a cost to him, plaintiff, of the sum of twenty-five hundred dollars ($2,500.00).

That he, the said plaintiff, pursuant to said contract procured the erection of a building for the accommodation of a post office, and procured the establishment of a post office by the post office department of the United States government, at said town of Hope, by him laid out as
48 hereinbefore set forth.

That pursuant to the provisions of said contract on his part to be performed, plaintiff erected in said town of Hope, by him laid out as aforesaid, a large and commodious store building, and granted the use and

occupation of the same for two years free of rent, to a merchant who in the summer of 1880 occupied the same and started, and has ever since occupied, and carried on therein, and now does occupy and carry on therein a grocery store for the accommodation of settlers in that locality. 49

That pursuant to the provisions of said contract on his part to be performed said plaintiff entered upon and procured to be surveyed, and field notes thereof made, that portion of said hereinbefore described purchased tract not surveyed at the date of said contract, to-wit, fifty thousand acres of said purchased tract, at a cost to said plaintiff of the sum of five hundred dollars [$500.00].

That said plaintiff from and after the date of said contract of purchase and sale and pursuant to its provisions has devoted his time exclusively to the work of advertising the locality in which said purchased lands are situated and in inducing immigration thereto, and in selling said lands out in 50 small tracts to actual settlers. That said plaintiff expended the full sum of eight thousand dollars ($8,000.00) of his own private funds in advertising said lands and the locality in which said lands are located, pursuant to the provisions of said contract on his part to be performed; and that through the exertions of plaintiff in that behalf three hundred families have been induced to immigrate to, and permanently settle in the locality in which are situated said purchased lands, and are now permanent residents therein.

That said plaintiff broke one hundred (100) acres of land on each of five sections of said purchased tract during the breaking season of 51 1881.

That said plaintiff did and performed, all and every, the acts, things and conditions by him to be done and performed under, by virtue of, and pursuant to the terms and provisions of said contract within the period fixed in and by said contract and in the manner therein prescribed.

That defendant never notified plaintiff to close said contract or complained that plaintiff was delaying payments of the purchase price unreasonably under the terms of said contract, or in any manner indicated or suggested to plaintiff or to anyone in his behalf, that it was dissatisfied with 52 said contract or with the action of the plaintiff thereunder, or that it would not fully execute the same until its refusal to convey to plaintiff, thereunder on, to-wit, March 1st, 1881, as hereinbefore set forth.

That before said refusal of said defendant to convey as aforesaid, to-wit, prior to March 1st, 1881, plaintiff had done and performed in every particular, all and every, the things by him to be performed up to that date under and by virtue of and pursuant to the provisions of said contract.

That there remains of said described purchased lands not conveyed to 53 said plaintiff the following described lands, to-wit:

The east one-half (E. ½) of section nineteen (19) and the east half o section thirty-one (31), township one hundred forty-four (144), range

fifty-six (56), sections one (1), thirteen (13), east half (E. ½) of section three (3), east half (E. ½) of section nine (9), north one-half (N. ½) of section fifteen (15), west half (W. ½) of section twenty-one (21), the
54 west half of the northwest quarter (N. W. ¼) and west half of southwest one-quarter (S. W. ¼) of section twenty-five (25) and northeast quarter (N. E. ¼) of section twenty-nine (29), township one hundred and forty-four (144), range fifty-five (55). Said described lands being a part of and included in said hereinbefore described purchased tract, and embraced in said contract of purchase and sale, and which said lands defendant refuses to convey to plaintiff under said contract.

That said above described lands which defendant refuses as aforesaid to convey to plaintiff, constitute in part that portion of said entire purchased
55 tract upon which plaintiff entered and surveyed and made field notes of at his own individual cost and expense, pursuant to the provisions of said contract of purchase.

That acting in good faith and relying on the good faith and fair dealing of said defendant, and previous to the refusal of said defendant to fulfill said contract by the conveyance of the last hereinbefore described portion of said purchased tract to him in pursuance with the provisions of said contract, said plaintiff sold for a valuable consideration and bound himself by contract to convey one undivided half of said last hereinbefore described lands to Edward H. Steele, of Minneapolis, Minnesota, and relying, as
56 aforesaid, upon the good faith of said defendant to execute and fulfill said contract as to the last aforesaid described lands, said plaintiff contracted a loan of two dollars ($2) per acre upon the half of said last described lands, not sold by him to said Steele, as aforesaid, the purpose and object of said loan being to enable the said plaintiff to perform faithfully all the conditions of said contract by him to be performed, and said sum of two dollars ($2) per acre so borrowed by said plaintiff was by him expended in discharging and performing his obligations and duties under and pursuant to said contract. And plaintiff further avers that he has done and per-
57 formed every act and thing by him to be done and performed under and by virtue of said contract, and pursuant to any and all of its provisions. That all the money, labor and time, so as hereinbefore stated, expended, done and performed by said plaintiff, was expended, done and performed by him, the said plaintiff, in consideration of the said defendant's contract as aforesaid, to convey to him all of said first herein described tract of land, pursuant to said contract.

That said plaintiff heretofore, to-wit, on the 24th day of March, A. D. 1882, at its office in the city of St. Paul, Minnesota, tendered said defen-
58 dant in its preferred stock at the par value thereof, the full and just sum of eight thousand seven hundred and fifteen dollars, being the full amount of the purchase price of said purchased tract remaining unpaid and the full and just value of that portion of said purchased tract, not conveyed to

plaintiff at the price fixed in and by said contract of purchase and sale, and that defendant then and there refused, and still does refuse to convey said lands to this plaintiff and to comply with said contract on its part.

And plaintiff avers that ever since said tender made as aforesaid, to- 59
wit, on the 24th day of March, 1882, he has remained and still is ready and willing to pay to the defendant the said sum of eight thousand seven hundred and fifteen dollars, in its preferred stock as aforesaid, and now brings the same into court for that purpose, and plaintiff further avers that he always has been and now is ready and willing to receive a conveyance of said premises according to the terms of said contract.

And plaintiff further avers that by reason of the breach of said contract on defendant's part, its refusal to convey to plaintiff as aforesaid the part or portion of said purchased tract remaining unconveyed as aforesaid, 60
and of its failure to specifically perform said contract according to its terms and provisions, plaintiff has suffered damages in the sum of seventeen thousand dollars ($17,000).

Wherefore plaintiff demands judgment.

I. That the said contract so made between the plaintiff and defendant hereinbefore set out may be specifically performed, and that said defendant be adjudged to convey said last hereinbefore described lands to plaintiff and to execute good and sufficient deed or deeds thereof to him on payment by said plaintiff of the balance of the purchase money of said 61
entire purchased tract as aforesaid.

II. That said defendant be adjudged to account and pay to said plaintiff the damages he has sustained by reason of the breach of said contract on defendant's part, and its failure and refusal to fulfill and execute said contract as aforesaid, to-wit, the sum of seventeen thousand ($17,000.00) dollars, and for such other and further relief as to the court may seem just and equitable and for his proper costs and disbursements herein.

REA, WOOLLEY & KITCHEL,
62
Plaintiff's Attorneys,
Minneapolis, Minn.

[DULY VERIFIED.]

Complaint endorsed:
Filed Oct. 27, 1882.
E. J. DAVENPORT, Clerk,
By C. B. TIRRELL, Deputy.

63

STATE OF MINNESOTA, } ss. DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

64 SANFORD S. SMALL,
Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,
Defendant.

ANSWER.

The defendant for answer to the complaint of the plaintiff admits that
65 it conveyed to the defendant or to the said Steele the lands described in the complaint from folios (12) to folio (31) inclusive, and that payments were made to the defendant for and on account of the lands so conveyed, to the amounts stated in the said portions of the complaint.

The defendant further admits that it has not conveyed, and that it is not willing to convey to the plaintiff any part of the lands described in folios forty-four (44) and forty-five (45) of the complaint.

Further answering, the defendant denies each and every allegation in the complaint contained, save the allegation of the defendant's corporate
66 existence, and save the allegation of ownership by the defendant of the lands described in the complaint, and save as hereinbefore expressly admitted; and the defendant further denies that the plaintiff has suffered any damage whatever by reason of the defendant not having conveyed to the plaintiff the lands described in folios numbered forty-four (44) and forty-five (45) of the complaint.

Wherefore the defendant prays to be hence dismissed with his costs and disbursements in this suit.

W. P. CLOUGH,
67 Attorney for Defendant.

[DULY VERIFIED.]

[TITLE OF COURT AND CAUSE.]

The petition of the Northern Pacific Railroad Company, the defendant in the above entitled action, respectfully showeth:

That your petitioner is a corporation created by and existing under the laws of the United States, to-wit: that certain act of Congress
68 approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line, from Lake Superior to Puget Sound, on the Pacific Coast by the Northern route," and the divers subsequent acts and joint resolutions of Congress relating to the same subject

matter; that the above entitled suit has been begun against your petitioner by the said plaintiff in the Court aforesaid; that said cause is still pending in the said Court and has never been tried; and that the term of said Court which begun on October 17th, A. D. 1882, and is now in progress, 69
is the first term of the said Court whereat the said cause could have been tried since the commencement thereof.

Wherefore your petitioner prays that the said Court proceed no further in said cause, and that the same be removed into the Circuit Court of the United States for the District of Minnesota for further proceedings therein.

W. P. CLOUGH,
Attorney for Petitioner.

Endorsed: "Filed, Oct. 18, 1882. 70
E. J. DAVENPORT, Clerk."

[TITLE OF COURT AND CAUSE.]

KNOW ALL MEN BY THESE PRESENTS, that W. P. Clough and E. G. Rogers, sureties of the Northern Pacific Railroad Company, defendant in the above entitled action, are held and firmly bound unto Sanford S. Small, plaintiff in the above entitled suit, in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which 71
well and truly to be made, we hereby bind ourselves, our legal representatives and assigns forever, firmly by these presents. Sealed with our seals and dated on the 18th day of October, 1882.

WHEREAS, the defendant in the above entitled suit, the Northern Pacific Railroad Company, has this day filed in the said Court, its petition praying for the removal of the said suit into the Circuit Court of the United States for the District of Minnesota for further proceedings therein.

NOW, THEREFORE, the condition of the above written obligation is such that if the said defendant, the Northern Pacific Railroad Company, 72
shall enter in the said Circuit Court of the United States, at the next session thereof hereafter to the holder, a copy of the record in the said suit; and shall pay all costs that may be awarded by the said Circuit Court, if the said Circuit Court shall hold that such suit was wrongfully or improperly removed thereto; then the said obligation shall be void, but shall otherwise remain of full force and virtue.

E. G. ROGERS. [SEAL.]
W. P. CLOUGH. [SEAL.]

STATE OF MINNESOTA, } 73
} ss.
Ramsey County. }

Personally came before the undersigned, a Notary Public in and fro

said county, W. P. Clough and E. G. Rogers, by me known to be the same persons who executed the foregoing instrument, and they acknowledged that they executed the same voluntarily.

74 Witness my hand and Notarial seal, on the 18th day of October, 1882.

C. S. ROHRER,
Notary Public,
Ramsey County, Minnesota.

[SEAL.]

STATE OF MINNESOTA, } ss.
Ramsey County.

Personally came before me the undersigned, a Notary Public in and for said County, W. P. Clough and E. G. Rogers, the sureties in the foregoing instrument, who, having been first by me duly sworn, did depose
75 that they are residents and freeholders of said state, and worth the sum of one thousand dollars above debts, liabilities and property exempt from levy and sale under execution.

E. G. ROGERS,
W. P. CLOUGH.

Subscribed and sworn to before me this 18th day of October, 1882.

C. S. ROHRER,
Notary Public.

[SEAL.]

76 COUNTY OF HENNEPIN, } Clerk's Certificate.

SANFORD S. SMALL,
Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,
Defendant.

I, E. J. Davenport, Clerk of the above named Court, do hereby certify and return unto the Honorable, the United States Circuit Court, for the
77 District of Minnesota, that I have compared the papers writing to which this certificate is attached with the original petition for bond on, and order of the Court removing the above entitled action into the United States Circuit Court, for the District of Minnesota, and also the summons, complaint and answer in said action as the same appears of record and on file in said Clerk's office at the Court House, in said Hennepin County, Minnesota, and find the same to be a true and correct copy of the files and records and all thereof.

In testimony whereof, I have hereunto set my hand and affixed the
78 seal of said Court, at the city of Minneapolis, this 19th day of October, 1882.

E. J. DAVENPORT, Clerk.
By ALBERT REED, Deputy.

[COURT SEAL.]

And afterwards, to-wit, on the 15th day of June, 1883, the following testimony on the part of the complainant was filed, said testimony being in the words and figures following :

TESTIMONY ON PART OF COMPLAINANT.

74

Q. What contract, if any, had you with the Northern Pacific Railroad Company with reference to the purchase of lands in Traill county, Dakota. Give date and lands embraced in the contract.

Defendant objects to all parol evidence concerning the existence or the terms of any contract for the sale by the defendant to the plaintiff of any of the lands described in the bill of complaint.

A. I had a contract about March 1st, 1880, to buy all the unsold 75
lands in town 146 and 145, 144, range 56 and 146, 145, 144, range 55, Dakota, Traill county; that is all the unsold lands which the company owned. The lands of the company unsold, which I have mentioned, are the same as those described in the complaint.

Q. Describe the manner of making this contract fully.

Same objection on the part of defendant as to previous question.

A. I went down to Land Department of Northern Pacific Railroad office on Jackson street, St. Paul, and told the Land Commissioner, J. B. Power, that I wanted to buy a large quantity of land, and told him that I 76
wanted it for improvement and to settle up, to get immigration in. He told me if I wanted a large body of land for that purpose he would like to sell it to me. He asked me what I proposed to do. I told him I intended to lay out a town, start a store, get a post office, then break some land on each section and sell it off for small farms. He told me to come down in a few days, and he would let me know more definitely about it. I went down in a few days again and he told me if I would do what I had stated to him, he would sell me that body of land up there which I have before mentioned at the price of $2.50 an acre, except town 144 in range 56,
which would be $2.75 an acre, payable in Northern Pacific preferred stock 77
at par value. He said he would give me a reasonable time, that I could get my stock along just as I could. I asked him if the lands would be withdrawn from market, and he told me they would right then.

He called Mr. Knowlton, the head clerk in the office, and told him that these lands were sold to me, and not to offer them for sale.

I told him, Mr. Power, that I would take the lands. He told Mr. Knowlton to notify the Brainerd office that the lands were sold to me. That was all that was said at that time. He told Mr Knowlton in my
presence to mark those lands on the plats as sold to me. 78

Q. What did you do in pursuance to this arrangement?

Same objection by defendant.

A. I went right to work. I built a hotel on these lands on section

31, town 145, range 55. I hired a team to run a stage line regularly from Tower City on the Northern Pacific Railroad to this hotel. I paid them a bonus of $50.00 a month, and they had all they could make. I
79 laid out a town about the hotel and called it Hope. When I started there were no improvements on any of these lands, or within 35 miles of them.

This town of Hope was about 35 miles from defendant's railroad, and when I first went there, there was no settlement between it and the railroad. We staked out for a town 160 acres about the hotel. The hotel was about the centre of the tract of land purchased.

Q. Did this land lie in one body, or were the various parts separated in some way?

A. They very nearly all cornered together. They were the odd
80 sections and could not lie in a solid body.

Q. Proceed and state particularly what you did with reference to the settlement of this territory and the improvement of it?

A. The first thing I done was to advertise, which I did through the papers, by pamphlets and by agents. I sent these papers and pamphlets all over the country; I hired agents to work up immigration. I hired one at Minneapolis, one at Fargo and one at Tower City. I built a building for a post office and had a post office established. The immigrants commenced coming in. We first gave them employment in breaking on this
81 land, on different sections of it. Some of these purchased part of these lands from me in tracts from ¼ to a whole section for actual settlement and occupation. A good many actually settled and are living there now on some of these lands. Up to the time the company, defendant, refused to carry out this contract I should think 50 families had come there and settled on these lands through the inducements which I offered them. Up to this time I should say there were 25 sections of these lands which had improvements on them. I also built a store in the town of Hope. The hotel and store were put in operation and the post office was also running. I built a blacksmith shop and got a blacksmith there. In securing immi-
82 grants and settlers I invited persons in search of lands to come there and entertained them while there at my own expense, persons who purchased lands of me and settled on them were carried at my expense from Tower City to Hope.

A short time after building the hotel the St. Paul, Minneapolis and Manitoba Railway Company run a survey up to that section where the hotel was built, then we changed the location of the town and re-located the town on the line between the same section where the hotel was and an adjoining section, which was section 1, in town 144, range 56, so as to be
83 on the line of the Manitoba road. This new location was platted into lots and blocks, and I built another large hotel costing $25,000. This hotel was built on the last named section—section 1. The last hotel was about one-fourth of a mile from the one built first. The first hotel cost $2,500.

When the county was organized we recorded our plat. This town of Hope is now in Griggs county, which was originally a part of Traill. We platted into this town 160 acres. At the time the Railroad Company, defendant, refused to convey any more lands, there were at least 50 buildings 84
in the town of Hope, and I should think 75 or 100 more in sight on other lands of my purchase, and on government lands in the vicinity which had been built by persons induced to come there by me. The houses on the plat were built by persons who had purchased lots of me, and those on the adjoining lands of my purchase, were built by persons who had purchased lands of me. At this time there were several hundred inhabitants in the town of Hope. From and after I entered into this contract, I spent the whole of my time up to the last day of last November in getting settlement up to these lands and in getting them improved. 85

Q. What knowledge had the defendant of your operations as above stated?

A. I told the Land Commissioner, J. B. Power, what I was doing from time to time, every time I would be in the office I had a talk with him about it.

Q. Did the defendant convey to you any of the lands embraced in this contract, if it did describe the time, manner of payment and the various quantities?

A. They did convey me lands at various times commencing 86
some time in April, after the making of the contract. The manner was this. I would take to the Land Commissioner what preferred stock I had and give it to Mr. Power and tell him I wanted that applied upon my purchase. He and Mr. Knowlton would take it and make me out a receipt for the amount of stock I had. Sometimes there would be a little stock left over what would pay for even sections and he would keep it until I came down with my next payment. He in every case designating the lands to which the stock should apply, and the conveyances which were made by the defendant were made pursuant to that designation. 87

When I would go down with other stock, that which was left over would be credited in the next payment. The conveyances which were made to me were made at various times. This method of payments and conveyances was kept up until Mr. Power ceased to act as Land Commissioner which was some time in February, 1881.

At that time I think I had stock in the hands of the Land Commissioner, for which I had not received lands.

Q. When did the defendant decline to carry out the contract or convey any further lands? 88

A. It was about the first of April, 1881.

Q. What was the capacity of these hotels as to the entertainment of guests?

A. The first one would entertain about fifty; the second one from one hundred and fifty to two hundred.

Q. State more particularly and at large the conversation which you
89 had with Power, the Land Commissioner, of defendant in your final interview with him when the contract was closed, and especially the terms of that contract with reference to what you were to do with reference to and upon the lands bargained for?

A. In our last conversation before closing Mr. Power asked me how much land I would break. I told him I intended to break some on each section, and he asked me when I would do that, and I told him I would keep at work at it until I had accomplished it. He said that was rather indefinite and wanted me to agree to break at least one hundred acres on each
90 of five different sections, not later than the end of the breaking season of 1881. I agreed to this definitely, that was all that it was agreed that I should do. I agreed to build a store and have it stocked with general goods, including groceries. There had been no survey of these lands at this time, and I agreed to get a surveyor and get the field notes of all these lands which I purchased, at my own expense. I agreed to lay out a town as near the centre of the lands as practicable, and agreed to build and procure the establishment of a post office, and to build a hotel capable of accommodating fifty people. I agreed to spend my time and use my efforts in procuring immigration to and the settlement of the lands and the selling
91 of the lands to actual settlers. Thereupon Mr. Power expressed himself satisfied with what I promised to do, and agreed to sell me the lands upon the terms I have stated.

Q. Where did you see the Land Commissioner, Mr. Power, at these interviews?

A. At the general land office of the Northern Pacific Railroad Company, St. Paul.

Q. In conducting these negotiations with you and in making this contract with you as you have stated, in what capacity was Mr. Power
92 professing to act?

A. As Land Commissioner of the defendant, the Northern Pacific Railroad Company.

Q. State what land you did break up to the close of the breaking season of 1881?

A. I think we had 1,000 acres broken and not over 100 acres on any section. I had on five or more sections I know a hundred acres broken on each. This breaking was not confined to sections to which I had procured title. Up to the time defendant finally refused to convey any more
93 lands, there was broken of these lands by myself and others I had induced to go and settle not less than 2,000 acres.

Q. State to what extent, as near as you can, that breaking was done on lands to which you had procured title?

A. At the time the company refused to convey to me any more of these lands, I had already received deeds of the lands on which breaking was done, but in some instances it was done before I got title, and the breaking was done on lands without reference to whether I had at the time procured title or not. 94

Q. State whether or not all of the lands described in the complaint were embraced in this one contract which you made with the defendant through Power, or whether there was any other separate contract with reference to the purchase of any of these lands, between you and defendant, so far as the agreement of the defendant to sell you the lands was concerned?

A. This one contract embracing the lands in the complaint is the only transaction I ever had with the defendant, except as to the subsequent carrying out of the contract, and all the lands subsequently conveyed were conveyed pursuant to this one contract, and all the work I did was done pursuant to this one contract. I went on and laid out this town, procured this post office and grocery store to be established and did the advertising and other things, as before stated, in fulfillment of this contract. 95

Q. State what you did relative to the survey and procuring field notes of these lands?

A. I employed a civil engineer at Minneapolis and went with him to Tower City and got our first mark or starting point there and chained it off 35 miles up to where these lands are. After he stuck the stakes and showed us where our lands were, I went to Fargo and secured the services of Randall Hunt to go up and take the field notes. He was a surveyor and expert in taking field notes. He went there and made and prepared field notes of every quarter section of the land described in the complaint. The lands not conveyed to me and which I am claiming in this action were a part of those he took field notes of. 96

Q. Were these lands at all selected with reference to their quality?

A. As far as I was concerned I took them as they ran without reference to quality. 97

Q. What do you know of your own knowledge about these lands being designated or marked upon the plats at or about the time you made this contract?

A. At the time I made this contract Mr. Power told me he would mark off these lands as sold to me, and a short time afterwards I was down in the office of the land department of the defendant, and saw them marked on the land plats in that office and in my name. I looked them all over and saw that all the lands described in the complaint were marked in my name with a lead pencil. 98

Q. State whether this town of Hope, laid out and located by you, was located as near as practicable in the center of this tract of land which you claimed to have purchased?

A. It was.

Q. Relate the circumstances of the defendant's refusal to convey?

A. I called down to the Northern Pacific offices about April 1, 1882,
99 and had a letter of introduction from Gen. Rosser to R. M. Newport, who was then Land Agent as I understood it of the defendant and who succeeded Mr. Power, to some extent at least in his former duties. I told him the circumstances of my trade—giving him all the details of the contract and what I had done under it. After giving him the details I asked him for a pass over the road, as Mr. Power was in the habit of furnishing, which he gave me. He then said he would look into my case and let me know the next time I came down what the company would do about it. I told him I wanted the balance of my lands. It was to this he made the
100 remark that he would let me know the next time I came down as above stated. In a few days I went back and saw Newport again at the offices of the defendant in St. Paul, and had another conversation with him. He said he had investigated the matter and thought I was entitled to the lands, and then he commenced to ask me some questions. He asked me what I was doing up there, and what I had done. He asked me who was interested with me up there. He asked me if Mr. Power was interested with me. I told him no, he was not. He asked me if Mr. Power was a particular friend of mine. I told him he was, that Mr. Power always used
101 me right. He said then he would have nothing more to do with it, nor me either. I then asked him for a pass up the road and he refused that, then I went home. In about a week I came down again and asked him again about the carrying out of the trade. I told him I was carrying out my part of the contract and I wanted the company to carry out theirs. He said the contract wasn't in writing and he would not carry it out and that I couldn't enforce it, and that he had no time to bother more with it. After that I saw Mr. Oakes two or three months after. Mr. Oakes was the vice-president of the company, defendant. I told him just the same as I did Newport my contract for the purchase of these lands, I told him
102 what I had done in substance as I have detailed here. He told me that he would order the lands withdrawn from market, and investigate it, and if he found it as I stated it to him that I should have my lands according to the contract, and if not I shouldn't. That is the last I heard of it.

Q. Go on now and state what you did subsequently to that in attempting to procure a conveyance of the balance of these lands.

A. I waited what I considered a reasonable time to hear from Mr. Oakes; then I went to my attorneys, and asked them what I should do. They told me to make a tender of the stock to the company according to
103 the terms of the contract, which I did, enough stock to cover the balance of the lands, and the company refused to give me the lands.

Adjourned until Tuesday morning, April 24, 1883, at 10 o'clock.

Tuesday morning, April 24, the same parties appeared by the same

solicitors, and the examination of Mr. Small being resumed further testifying, in chief he says:

Q. Can you now give the description of the lands which were included in the contract between you and the defendant about March 1, 1880, 104
that you have testified about? If so, give such description.

A. I can. They are as follows: sections——I do not think I can do that this morning, as I have not a memorandum with me.

Q. Can you give a description of that portion of the lands included in that contract which have not been conveyed to you by the defendant? If so, give such description.

A. I can. They are as follows: E. ½ of sec. 19, E. ½ of sec. 31, Town 144, range 56. Sections 1, 13, E. ½ sec. 3, E. ½ of sec. 9, N. ½ of sec. 15, W. ½ of sec. 21, W. ½ of N. W. ¼ and W. ½ of S. W. ¼ 105
of section 25, N. E. ¼ of section 29, in town 144, range 55.

Q. Can you now give the amount of preferred stock of the defendant Railroad Company, which was by you tendered to the defendant as you have testified, and state also when said tender was made, as near as you can fix the date.

A. Said tender was made the 27th day of March 1882. There was 87 shares and 15-100 of a share. They were $100 shares.

Q. State whether that covered the agreed price of the unconveyed lands included in this contract, or whether there was already some stock 106
which had before been tendered on account of this contract, and which was then in the hands of the Land Commissioner, and if so, how much?

A. This tender just covered the contract price of these lands.

Q. Where was this tender made?

A. At St. Paul in the Northern Pacific Railroad Company's office.

Q. What, if any demand, was made upon the defendant when this stock was tendered by you?

A. I tendered the stock and told R. M. Newport, Land Agent, that that stock just covered the purchase price of the balance of my lands and 107
that I made a demand of a conveyance of them.

Q. What was the answer?

A. He said I had no more lands due me.

Q. State what if any steps you had taken and trouble and expense incurred in making preparation for this final payment or tender before you had received any notice from the defendant or its commissioner or agent, that defendant would not convey the remainder of said lands.

A. I negotiated a loan of $2.00 an acre, through Elisha Morse, of Minneapolis, to get money to pay for these lands, that is, to buy stock and gave a mortgage upon part of these unconveyed lands, to secure the 108
loan, and I paid him five per cent commission for getting the loan. That loan was of $2,560.00.

Q. Prior to the time of your conversations with Newport, the Land

Agent of the defendant as you have stated, did the defendant in any way notify you of any dissatisfaction with said contract, or of any dissatisfaction with your acts and doings thereunder, or complain of any delay upon your
109 part, or suggest in any way that it would not convey the remainder of said lands for any reason?

A. It did not.

Q. Had you prior to said conversations with said Newport, the Land Agent, entered into any contract with any other person concerning the conveyance to such other person of any interest in said unconveyed lands or any part thereof; if so, state with whom and what.

Objected to by defendant's counsel. First, that it is immaterial, and second, if there was any contract it should be produced if it were in writ-
110 ing, and if it were not in writing, defendant objects to any evidence being given of it.

A. I sold an undivided half of all the lands unconveyed to E. H. Steele, of Minneapolis. I think I gave Mr. Steele a deed but am not sure. A deed of an undivided half interest—I have not the deed or any copy with me, but think Mr. Steele has it.

Q. State whether the money which you raised by loan through Morse, as you have stated, was actually expended by you in the purchase of the stock of defendant, with which to tender payment for this unconvey-
ed portion of said lands?
111

A. It was. This loan was effected and this conveyance to Steele before I received any intimation from the defendant or its commissioner or agent, that the company, defendant, would not convey the balance of these lands.

Q. Why did you perform all these acts and things which you have testified?

A. Because I agreed to. It was my contract.

Q. State whether you did and performed all these acts and things, relying upon the contract of the defendant which you have stated, to con-
112 vey to you all of these lands?

A. I did.

Q. In your conversations and dealings with Mr. R. M. Newport, concerning this matter, in what capactity did said Newport profess to be acting?

A. General Land Agent of the defendant.

Q. Did the defendant ever convey to you the lands described in the complaint as unconveyed or any part thereof?

A. It has not.

113

CROSS-EXAMINATION.

Q. Please state if any paper or papers were given you by the defendant relating to the purchase by you of any of the lands described in

the bill of complaint, other than deeds; if so, state the nature of such papers and what has become of them?

A. I received one or two letters giving me the number of acres there was in each township and fractional part of townships and telling me how 114
much stock it would require to pay for said lands. I think these letters were from Mr. Power; from either him or Knowlton, his head clerk. I also received receipts or certificates for stock in payment of lands when I would take it down or a few days afterwards. The certificates or receipts some of them I returned and some I think are around my office. The letters I think I have on file.

(The witness is requested to produce any of the receipts mentioned, which he may have in his possession.)

Q. Were these receipts all similar in form? 115

A. I think they were.

Q. Did each of them contain description of particular tracts of land?

A. I think they did.

Q. They also recited that you had purchased from the defendant and paid for the tracts of land therein described?

Objected to by plaintiff's solicitor as incompetent and immaterial and not the best evidence.

A. I think they did.

Q. Did you receive deeds from the defendant for any lands except 116
those that had been embraced in a prior certificate of a character just mentioned?

A. My recollection is I did.

Q. State the description of any tract of land deeded to you by the defendant that had not been embraced in a prior certificate?

A. I can't remember the descriptions.

Q. Can you furnish them?

A. I don't think I can.

Q. When did you first see Col. Newport about these lands?

A. The first week after he came back and came down to the office. 117

Q. The witness is shown page 19 of this deposition and is asked to state what breaking or other improvements have been made upon any of the tracts of land therein described by him or by his direction?

A. I think there is a little breaking on the E. ½ of section 19, town 144, range 56, other than that there is not any improvements.

Q. When was that breaking done?

A. I think in the year 1880. It was done by my direction.

Q. Give the date if you can of your interview with T. F. Oakes?

A. I think it was in the spring or early summer of 1881, but am not 118
sure.

S. S. SMALL.

April 24.

J. B. Power a witness produced on the part of the plaintiff being first

duly sworn deposes and says: I am 48 years old; reside at St. Paul, Minnesota; am land commissioner of the St. Paul Minneapolis & Manitoba Railway Company.

119 Q. What was your business in March, 1880?

A. Land Commissioner of the Northern Pacific Railroad Company,

Q. When did you become land commissioner of the Northern Pacific Railroad Company?

A. I don't remember exact dates, I received the appointment in the fall of 1878, and held the position continuously until February, 1881.

Q. Did you personally perform the duty of land commissioner for that company during all this time?

A. Yes, sir, I was at the head of that department and personally
120 controlled it during all that time. My appointment as land commissioner was under restriction but the duties merely pertained to the care of their lands in Minnesota, Dakota and Montana.

Q. State generally and fully what were your duties and powers as land commissioner of the defendant Railroad Company during this time.

A. The general charge of all lands belonging to the company. The appraisement of the same and sale, with authority to make and sign all contracts of sale; to dispose of lands in such way as my judgment thought best for the interest of the company, and to receive pay for the same.

121 Q. What restrictions, if any, were placed upon you by the defendant concerning the form or manner of making contracts for the sale of lands?

A. None whatever, except such as might be inferred from the general terms of the letter of appointment, which subjected me to instructions from the board of directors from time to time, and perhaps also from the President, but as to the President I am not certain.

Q. What prescribed form was there, if any, required by the board of directors or President of the defendant for land contracts made by you as land commissioner?

122 A. The Board of Directors never made or suggested any form of contract. The forms in use in my office were made by me after consulting with our legal adviser. Those forms were never even submitted to Board of Directors. They were made by me, and acquiesced in.

Q. With respect to the form of land contracts what restrictions were there, if any, as to their being written or oral, by the Board of Directors or President?

A. There were none whatever.

Q. Were there any restrictions of that kind from any officer or authoritative source in the company, defendant?

123 A. There were none whatever.

Q. Then, if we understand you rightly, you had general authority to sell and dispose of the lands of the defendant in your discretion, and to

prescribe in your discretion the manner and form of making contracts for such sales to and with purchasers of lands from the defendant?

A. I so construed the authority conferred in my commission as land commissioner, and acted accordingly during all the time. 124

Q. Was your action during this time in the matter of making sales of land in the manner you have stated and your construction of your authority under your appointment brought to the knowledge of the defendant and its directors, and if so was it questioned by the defendant or its directors during that time?

A. The defendant and its Board of Directors had full knowledge of all sales by means of regular monthly reports specifying particularly lands sold, names of purchasers and price for which it sold, and during the entire time of my administration all my contracts for sales were approved, 125 and in only a few exceptional cases were explanations asked by the President. In those cases explanations were satisfactory and deeds were issued.

Q. Do you know the plaintiff in this action and when did you first become acquainted with him?

A. I know the plaintiff; became acquainted with him about the time he commenced negotiations for the purchase of lands from the defendant. I became acquainted with him through those negotiations. This was early in the year 1880, at the land offices of the company here in St. Paul.

Q. State fully what, if any, negotiation and agreement was had between yourself as land commissioner of the defendant and the plaintiff 126 in this action as to the sale to him of any lands of the defendant. What lands and what were the terms of such agreement, if any, as to price and payment and manner of payment, as also as to conditions to be performed by said plaintiff upon and in reference to such lands?

Defendant's counsel objects to the introduction of any verbal evidence of the existence or terms of any contract between the plaintiff and defendant for the transfer of any of the lands described in the complaint.

A. Mr. Small introduced himself as a would-be purchaser of a large tract of the company's lands, some 50,000 acres if I remember correctly, 127 situated mostly in the southwestern part of Traill county, Dakota Territory, and the land was lying from 15 to 30 miles from the road of the defendant. The exact sections and townships I can't now designate. They could be proven by the records of the office. The application for the purchase of the lands carried with it a proposition to improve by tillage, the erection of houses and the settlement of the lands by persons that were to be brought into the country by the applicant. Without remembering the exact detail of the acres which should be improved, the buildings which were to be erected, or the number of settlers which were to be brought in 128 in a specified time, I considered the transaction as one which would be of benefit to the company, and fixed prices on the lands applied for, and agreed to sell at those prices, so soon as satisfied that the applicant could

carry out his plans and agreements. These prices were from $2.50 to $2.75 an acre. Am not certain whether some did not reach to $3.00, but I cannot say that any did reach $3.00 per acre. Payments for those lands
129 were to be made in the preferred stock of the company at par. The times of payment were not absolutely fixed, but it was understood that payments could be made from time to time as that preferred stock could be procured. The agreement of the applicant as to improvement, settlement, etc., and payments were made and performed to my satisfaction until up to about the time when I left the employ of the company. All the lands applied for, with the exception of about 5,000 acres, were taken, paid for and conveyed. Before sale was made of any of the lands I enquired of Mr. Chas. Pillsbury, of Minneapolis, who stated that Mr. Small was amply able
130 to carry out all his agreements, and I could safely enter into any agreement with him. In fact, he was willing to guarantee the performance by Small of any agreement he might see fit to make. By this I was satisfied of Mr. Small's ability, and closed the agreement with him.

Q. Were these lands which you so agreed to sell to Mr. Small surveyed lands?

A. Whether surveyed or not by the United States Government, I am not prepared to say, but they had not been examined by the company after their usual manner before making sales and we had no field notes of them. It was not customary for the company to examine lands before
131 they were surveyed by the Government.

Q. Can you state whether these lands which were agreed to be sold to the plaintiff, were all or any portion of unsold lands in certain numbers of towns or townships, and if so what towns or townships.

A. They were all of the unsold lands in the townships to be taken, that is, all of the unsold lands of the defendant in these townships, but the exact numbers of the townships I can't specify.

Q. Do you remember what, if any, agreement or understanding was had with the plaintiff relative to the procuring by him of any survey or
132 field notes of these lands so agreed to be sold to him?

A. Simply if he wanted to be prepared to describe those lands he must make his own surveys and prepare his own field notes.

Q. Do you mean to say that it was agreed by the plaintiff that there should be by him improvement or tillage or breaking upon all the sections or subdivisions of land agreed to be conveyed to him within any time or at all, or was there some number of sections or subdivisions specified upon which such improvement or tillage or breaking was to be done by him within a given period of time or at all?

133 A. It was not understood that every particular tract purchased should be improved, neither were any sections designated upon which improvements should be made, but that within the limits of the territory purchased the improvements agreed upon should be made. The particular locality

was to be selected by the purchaser, simply the area that was to be broken up was specified. At this period of time I cannot specify particularly what improvements Mr. Small was to make or what he was to do in respect to bringing in settlers, etc. 134

Q. Can you state whether or not up to the time your connection with the defendant company ceased, you had investigated and were informed as to what the plaintiff was doing and accomplishing in the way of carrying out his agreements and whether such investigation or inquiries were satisfactory or otherwise?

A. I had satisfied myself that he had not only fully, but more than carried out his agreements.

Q. Do you remember whether one thing to be done by him was the building of a hotel on some portion of this land, and if so, of what capacity such hotel should be? 135

A. Yes. I remember a hotel was one of the things to be erected. The capacity I do not remember.

Q. Do you remember whether anything was agreed to be done by him in respect to the building and establishment of a store and the building and establishment of a post office on some portion of this land?

A. I remember the building a store was one of the things he was to do, but the building and establishment of a post office I don't remember about. I remember both the store and hotel were specified, because he made arrangements to take in the lumber, as he stated these were both essential, to be done at once. 136

Q. Do you remember whether anything, and if so, what was agreed with respect to the laying out of a town upon any portion of this land, and if you say you do remember such agreement, state if you can, upon what portion of the land said town was to be laid out?

A. I do not remember as that was part of the agreement, but it was expected that would follow, as a matter of course. I don't think it was a part of the agreement, but it was understood that the settlement of the land would necessitate a town, but there was no designation of any part of the land for it, but afterwards informing myself of Mr. Small's work, I knew of a town being laid out. 137

Q. State if you know what was done upon the records and maps of the defendant's lands in its land office relative to designating thereon the lands so agreed to be sold to plaintiff, as having been bargained to him.

A. All of the lands that were agreed to be sold to plaintiff, were marked up on the sales plats in the office by his name being written across the sections and parts of sections. This done as soon as the agreement was finally completed, don't remember the date. It was during the summer of 1880. 138

Q. State if you know whether these designations so made by marking upon the land plats, included all the lands agreed to be sold to the

plaintiff as well those which were subsequently actually conveyed within your knowledge as those which remained unconveyed as you have before stated?

139 A. It was intended to mark everything. If there were any omissions they were simply clerical. I don't think there were any.

Q. When you say that about 5,000 acres of the lands so agreed to be sold remained unconveyed at the time you ceased to act for the defendant, do you mean that that was the quantity of land, or might it not be a larger quantity than that?

A. It was about it, I don't remember the exact area. I simply remember shortly before I left the office Mr. Small called at the office to see the amount of preferred stock he would have to have to complete the agree-

140 ment.

Q. You may now state what was done between yourself as land commissioner of defendant, and the plaintiff subsequently to the making of this agreement, which you have testified about relative to the making of payments upon these lands, and the conveying by deed from the defendant to the plaintiff?

A. It was simply as he brought me the preferred stock I wrote up certificates of sale for the area that would be covered by that payment of stock. That was done from time to time as the preferred stock was

141 brought in.

Q. Who selected out of the whole body of land which had been included in this original agreement, the particular descriptions which were so from time to time inserted in these certificates?

A. I made those designations except it might have been in some particular cases, Mr. Small selected some particular tract which he had sold. It was understood that I should make the selections generally. It was sometimes difficult to fit an exact amount of stock with a specified area, and I often had large amounts of stock until balances could be procured to make payment for a given area. We never divided a government sub-

142 division.

Q. Upon those certificates so given by you the plaintiff procured deeds from the company of such lands as were deeded to him?

A. Yes, sir.

Q. What was the course of business in sending forward those certificates and procuring the deeds. How was it done, and from whom were the deeds issued?

A. The certificates of sales were given to the purchaser. The report of all sales made monthly to the Board of Directors. The deeds

143 written in my office sent forward with the statements that payments were made on the particular sales which the deeds represented, they were then signed by the President, countersigned by the Secretary and returned to me for delivery, and I delivered them to the purchaser—to the plaintiff in this particular case.

Q. Do you remember whether at the time your connection with the defendant as land commissioner ceased any stock which had been previously paid to you by the plaintiff upon the purchase of this land was remaining in your hands for which certificates had not been issued. 144

A. I am not positive, but I think there was a little.

Adjourned until Thursday morning, April 26, 1883, at 10 o'clock.

Thursday morning, April 26, 1883, the parties appeared by their said solicitors. The witness, Power, being further examined by plaintiff's counsel says:

Witness is shown a paper which is marked exhibit A.

Q. You spoke in your testimony of your appointment as land commissioner of the defendant; state whether you recognize the paper now shown you purporting to be a resolution of the Board of Directors of the 145 defendant, and marked exhibit A as such appointment, and as the authority under which you acted as land commissioner of the defendant.

A. My appointment or notice of appointment first came by telegraph, and afterwards this resolution was sent me which I recognize as my appointment. Exhibit A offered in evidence.

Q. Had you at any time any other communication from the defendant defining your powers and duties as land commissioner.

A. Nothing defining my authority or powers under that commission.

Here the counsel for the defendant admits that the paper "exhibit 146 A," is a correct copy of a resolution which was passed and adopted, September 25, 1879, by the Board of Directors of the defendant corporation, and transmitted to the witness, J. B. Power, as land commissioner of the defendant, produced from the Land Office of the defendant in St. Paul, subject to correction in case it should be found to be erroneous in any particular.

CROSS-EXAMINATION.

Q. Do you mean to say that outside of the resolution exhibit A, 147 there were no rules or instructions of the defendant regulating the transaction of business in its land department in force while you were defendant's land commissioner?

A. None whatever. There was nothing in the way of special instructions or directions except as might have been implied in letters from the President, asking explanation in regard to certain sales.

Q. Did you make any report to the President or Board of Directors concerning the transaction with Mr. Small, about which you have testified; if so, state when such reports were made as nearly as you can remember? 148

A. I never made a report of the original agreement, but reported month by month the payments as they were made from time to time on the lands agreed to be sold.

Q. Do you remember of going to New York to the headquarters of
149 the defendant company there, sometime before you ceased to act as land commissioner for the defendant, and after this agreement was made with Mr. Small, as you have stated, and taking with you a written statement made by Mr. Small, concerning his acts and doings in respect to this agreement to be reported to the President or Directors of the defendant?

A. I remember the statement made by Mr. Small setting forth in detail what he had done up to that time, but don't remember reporting that specifically, but may have included mention of that the same as other transactions, as it was my habit to report verbally to the President and the members of the Board as opportunity offered at the New York office, of
150 all transactions and agreements that I thought would interest them to know of.

Q. In your last answer you spoke of remembering of receiving a statement from Mr. Small at that time. What time do you refer to?

A. That was in the winter, in December, 1880 or January, 1881. I was going to New York at that time, and it was customary on such occasions to carry with me statements and data on which to make a report of all items of interest pertaining to the settlement and development of the country and general work of the Department.

151 Q. State now your best recollection as to whether you did, or did not, at that time, or any time, make such a report or statement as mentioned in your two last answers to the President or Directors of the defendant or both concerning this agreement and transaction with the plaintiff, Mr. Small.

A. No, I do not remember anything more than I have already stated. It was customary in the business of the department to make agreements for the sale of lands that were never reported specifically until sales were completed and payments made, and then they were reported in the
152 usual form of monthly reports.

Q. When you spoke of your habit of gathering data, items, etc., upon which as occasion offered you made verbal reports to the President or Directors, did you refer to the agreements for sales, mentioned in your last answer, as among the things which you were so accustomed to report?

A. Yes; I generally gave an idea of the quantity of land that was applied for by parties intending to purchase, for the purpose of giving some idea of what could be expected in the amount of preferred stock to be retired for lands in the months following. At one time at the close of a
153 month's business in response to the President's usual telegraphic enquiry as to the sales for the month, I replied, giving actual area taken at that time, adding that I had a sale on foot that it was expected would be closed in a few days that would retire an additional forty to fifty thousand dollars

of the stock, and if books could be held open the month's business would show finely. His answer was to complete the sale before making monthly report.

RE-CROSS EXAMINATION. 154

Q. What became of the written memorandum referred to by you in your re-examination as having been made by Mr. Small?

A. I suppose it is in the St. Paul office yet.

Q. Did you take it with you to New York when you went in January, 1881?

A. I don't think I did, think I simply took memoranda from it, would not be positive as I don't remember particularly.

Q. Did you ever report to the President or to the Board of Directors of the defendant the transactions with Mr. Small about which you have testified; if so, when and how were such reports made? 155

A. Only as heretofore stated.

Q. Do you wish to be understood as testifying that you ever reported to the defendant's President, or Board, what you have referred to in your evidence as the original agreement with Mr. Small?

Objected to by the plaintiff as incompetent and irrelevant, that as between the plaintiff and defendant it would be immaterial whether he reported to the defendant an agreement which he had made by authority of the defendant. 156

A. I do, in the manner and times as heretofore stated.

Q. You wish then now to retract the answer made in the first cross-examination, in which you said you did not make any such report?

A. I do not wish to retract anything. That answer, I said, I did not make any specific report of the agreement.

Q. Did you ever mention to the President or Board of Directors of the defendant the existence or terms of what you have referred to in your testimony as the original agreement with Mr. Small; if so, give the date or dates when such statement was made, the place where it was made and to whom it was made? 157

A. I don't remember of giving specific detail of the agreement, but reporting the transaction or agreement to be in a general way as heretofore stated,—times and dates I can't remember. It was to the President and members of the Board. I wish it understood that the reports I am now referring to were informal statements, in other words, not formal reports.

Q. Were these verbal or in writing?

A. It was verbal. 158

Q. Where was the president of this company when you made to him any report concerning this transaction?

A. In his office in New York, as that was where all communications were usually held with him.

Q. Did you mention it to him on more than one occasion?

159 A. Probably not; and yet it is not unlikely.

Q. Can you remember any particular occasion when you mentioned it to him?

A. I cannot.

Q. Do you recollect, as a matter of fact, of having made any mention of this matter to the defendant's President or Board of Directors; if so, state what you said upon the occasion concerning it.

A. Only as I have heretofore testified. I have already stated that in making reports informally as heretofore stated I did to the best of my
160 recollection report this agreement, the same as other agreements for sales not completed. I don't remember any specific statements. I have no recollection of what was said by those to whom this report or statement was made. Don't remember that any objections were made. Don't remember what I said.

Q. Why did you not report this so-called original agreement, in accordance with the directions of the Board embodied in the resolution, "exhibit A," which are in the following terms: "they shall make reports in detail to the President every month in time for the regular meetings of
161 the Board of all transactions of the previous month concerning the business of their respective departments."

A. I did not consider it necessary to report any transactions until completed, or in other words, sales perfected by payment. Except as heretofore stated those reports made informally from time to time, informally as opportunity offered.

Q. The reason then of omitting to make such a report as your instructions required of the so-called original agreement with Mr. Small was because you did not consider it as a perfected transaction.

Objected to by plaintiff as incompetent and immaterial.

162 A. In my opinion I considered the agreement binding as between Mr. Small and the company at the time it was made in the spring of 1880; at the time we had the conversation, at the time that agreement to sell was made.

Q. State in a rough way how many acres of land and how many dollars in price that transaction involved?

A. About fifty to fifty-five thousand acres of land in prices ranging from $2.50 to $2.75 per acre. As I have already testified, some of that may have been $3.00 an acre.

163 Q. How soon after making that verbal arrangement did you in any manner mention it or report it to the defendant's President or Board of Directors?

A. I have already testified as to the report of the original agreement.

I have nothing further to state than I have already testified, but as payments were made from time to time on this original agreement they were reported from time to time in my monthly reports.

Q. Did the monthly reports in any manner refer to the verbal understanding? 164

A. They did not.

Q. On how many occasions after making the verbal arrangements did you meet the defendant's President or Board of Directors. Give the dates of such meetings as near as you can remember them.

A. I don't remember. I met them various times, sometimes here and sometimes in New York. The Board never met here but individual Directors were here sometimes and the President.

Q. From the time of the making of this verbal arrangement until you ceased to be land commissioner of the defendant, was the President of the company ever in St. Paul or in the West? 165

A. I think the President made one trip here in the fall of 1880, and I think he was here during the summer of 1881.

Q. Was his visit in the fall of 1880, before entering into this verbal arrangement?

A. It must have been after; as to that I am not positive as I don't remember the date of the original agreement.

It is here admitted that R. M. Newport, Land Agent of the defendant had authority to decline to make a conveyance to the plaintiff of the tracts of land, the conveyance of which is sought to be compelled by this suit. That he did so refuse, and his refusal was the refusal of the company, defendant. 166

Adjourned until Friday morning, May 4, 1883, at 10 o'clock.

May 4, 1883, the plaintiff appeared by his solicitors.

The witness, Power, being further examined on the part of the plaintiff.

Q. In your last cross-examination you stated that you had reported this original agreement with Mr. Small, the plaintiff, for the sale to him of these lands, to the President and some of the Directors of the defendant in an informal way in the same manner that you had reported other similar transactions and agreements for the sale of lands of the defendant with other persons. Do you mean by this that there had been other similar transactions and agreements for the sale of lands of the defendant to other persons; if so, state how frequently and to what extent it was your custom to make sale of defendant's lands by such agreements and whether they were reported in the same way to the President and Directors of the defendant and in the same manner ratified by them, and further whether any such sales were pending and uncompleted by payment and conveyance at the time your official connection with defendant ceased. 167 168

A. It was the practice of the department to agree to sell in some in-

stances in large areas—transactions sometimes embracing several thousand acres, ranging as high as from ten to fifty thousand acres, and lands so wanted in these large tracts were withdrawn from market, giving parties
169 opportunities to examine, determine as to purchase and time given to procure stock to make the payments, sometimes months elapsing before these agreements were completed by payment and conveyance. One instance in point was a sale to Mr. Tower, one of the Directors of the road, in the same manner of some 40,000 acres of lands unsurveyed the same as these of Mr. Small. I mean unexamined by the company, and this tract was near the lands in question, and if I remember correctly it was several months before that agreement was completed by payment and transfer. Large tracts were selected and withdrawn from market for completion of
170 sale by payment and conveyance for Mr. Billings, the President then or later of this defendant company. He was certainly a Director. These tracts ranged from five to fifteen thousand acres in area. Transactions of similar character where lands were withdrawn from market for some time were made with Mr. Thaw, of Pittsburg, a heavy stockholder, and I think at one time a Director. Also for Mr. Dilworth, of Pittsburg, one of the Directors. One for Mr. J. W. Dwight, of New York State, covering from fifty to seventy-five thousand acres. With Mr. Chas. Pillsbury, of Minneapolis, covering some 30,000 or more acres of pine lands. All of the transactions referred to were completed by payment and conveyance before
171 I left the employ of the company, except that of Mr. Pillsbury and Mr. Dwight, and some for Mr. Billings, that he did not take. Without remembering any particular time or place when these agreements were reported, they were as heretofore testified, informally talked of with the President and Directors, and as I understood fully understood by them. At least I am thoroughly satisfied that the President, Land Committee and Board of Directors generally understood the practice of the Department in selling lands and never objected to it, and all completed sales based upon these original agreements were ratified and deeds given. In Mr.
172 Pillsbury's case the agreement was only partially carried out by payment and conveyance when my official connection with the company ceased. The transaction with Mr. Pillsbury was precisely similar to that with Mr. Small, so far as being a verbal agreement.

JAMES B. POWER.

Adjourned until Monday morning, May 7, 1883, at 10 o'clock.

Monday morning, May 7, 1883, the parties appeared by their solicitors.

173 The witness, S. S. Small, being recalled for the plaintiff, says: In my testimony formerly given I testified that I called down to the Northern Pacific offices about April 1, 1882, and had a letter of introduction from General Rosser to R. M. Newport; the date should be April 1, 1881.

Q. Have you now your memorandum, your original memorandum of the lands embraced in the contract in question, and can you give a description of these lands as well those that were conveyed afterwards, as those which are still unconveyed?

174

A. I have already given the description of the unconveyed lands, and have the memorandum of the conveyed lands, which are as follows: Sections 3, 5, 7, 9, 15, 17, 19, 21, 27, 29, 31, 33, in town 146 of range 55. Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, in town 145, range 55. All of sections 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, in town 145, range 56. All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35, in town 146 of range 56. All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in town 144, range 56. The east half of sections 19 and 31, town 144, of range 56 are still unconveyed and have been testified to by me as such before.

175

Q. State whether at the time you entered into this contract with the defendant you knew that the defendant's land commissioner was accustomed to make such verbal contracts with other purchasers of defendant's lands?

Objected to by defendant's counsel as incompetent.

A. I did.

It is here admitted that a tender of the stock which the plaintiff has testified to is not necessary to be made to the examiner. It is also admitted that it is unnecessary to offer the same as evidence at this time. It is further admitted that R. M. Newport at the time the plaintiff alleges that he tendered the stock to him was the proper person and officer of the company to whom tenders of that character should be made.

176

S. S. SMALL.

EXHIBIT "A."

Board,

Sept. 25th, 1879.

177

Resolved, That the lands and land interests of this Company be divided into two Departments, one to be called the Eastern Department, which shall embrace all the Company's lands, and interests in lands, in the State of Minnesota and in the Territories of Dakota and Montana; and the other to be called the Western Department, which shall embrace all the Company's lands, and interests in lands in the State of Oregon and in the Territories of Washington and Idaho; and that the preservation, protection, care, management and disposition of the lands belonging to the Company, or in which it shall be interested, except lands within the right of way or used in connection with the operation of the road, in each of said departments, shall be in charge of an officer to be appointed by the Board of Directors, who shall be designated and known as "Land Commissioner of the Nor-

178

thern Pacific Railroad Company." The Land Commissioners shall hold their office at the pleasure of the Board, and they shall receive such compensation as the Board may from time to time determine. They shall
179 make reports in detail to the President every month, in time for the regular meetings of the Board, of all transactions of the previous month concerning the business of their respective Departments; and summarized reports every year in time for the annual meeting of all such transactions of the preceding year, ending with the 30th day of June, and of the condition and practical operation of their respective departments, with such other information and such suggestions as may be desirable and appropriate. The land commissioners and the business management and operation of their respective departments, shall be always subject to the rules and
180 regulations the board may from time to time prescribe, and to the orders and instructions of the president.

Resolved, That James B. Power, Esquire, of Saint Paul, Minnesota, be and he is hereby appointed Land Commissioner of the Northern Pacific Railroad Company for the Eastern Department.

Resolved, That until the appointment of a Land Commissioner for the Western Department, the land business of the Company in Washington and Oregon, be conducted as heretofore, and that General J. W. Sprague, be directed hereafter until otherwise ordered to make his reports to the
181 President.

(Endorsed on back)

"*Resolution*"

Division into Departments of Land Interests.

Sept. 25th, 1879.

And afterwards, to wit, on the 18th day of June, A. D. 1884, said cause came on for hearing and was by the court taken under advisement, the entry of said order being in Term Minutes "F," page 373 and in the words and figures following:

182 SANFORD S. SMALL,

vs.

NORTHERN PACIFIC RAILROAD COMPANY.

This cause coming on to be heard upon the pleadings and proofs, complainant appeared by J. M. Shaw, Esq., his solicitor, and defendant by W. P. Clough, Esq., its solicitor. Thereupon said cause is duly argued by said solicitors, duly submitted and by the court taken under advisement.

183 And afterwards, to wit, on the 24th day of June, A. D. 1884, the following order dismissing said cause at complainant's cost, was entered of record in Term Minutes "F," page 388, in the words and figures following:

SANFORD S. SMALL,

vs.

NORTHERN PACIFIC RAILROAD COMPANY.

184 This cause having been heretofore fully heard upon the pleadings, proofs and arguments of the respective counsel, duly submitted and by the court taken under advisement.

Now the court after due consideration thereof and being fully advised in the premises, announces its opinion concerning the same.

Pursuant thereto it is by the court ordered that the bill herein be and the same is hereby dismissed and that the defendant have and recover of and from the above named complaint, its costs to be taxed and that it have execution therefor. (Signed) R. R. NELSON. Judge.

185 And afterwards, to wit, on the 25th day of June, 1884, the following order allowing appeal was entered in Term Minutes "F," page 394, said order being in the words and figures following, viz:

SANFORD S. SMALL,

vs.

NORTHERN PACIFIC RAILROAD COMPANY.

186 A decree dismissing complainant's bill herein having been heretofore duly signed and entered, now this day comes the complainant by his solicitor, J. M. Shaw, Esq., and moves the court for an appeal to the Supreme Court of the United States, which is accordingly granted.

UNITED STATES CIRCUIT COURT,

187 DISTRICT OF MINNESOTA.

SANFORD S. SMALL, Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

188

BOND ON APPEAL.

Know all men by these presents, that we, Sanford S. Small, as principal, and E. H. Steele and J. M. Donelson as sureties, are held and firmly bound unto the said, The Northern Pacific Railroad Company, defendant in error in the above entitled action, in the sum of five hundred (500) dollars, lawful money of the United States, to be paid unto the said, The Northern Pacific Railroad Company, its successors, heirs, executors, ad-
189 ministrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 19th day of May, A. D. 1886.

The condition of this obligation is such that Whereas, the said Sanford S. Small, plaintiff in error, has appealed to the Supreme Court of the United States of America from an order of the said Circuit Court, made and entered the 24th day of June, A. D. 1884.

Now therefore, if the said Sanford S. Small, plaintiff in error, shall
190 prosecute his appeal to effect and if he fail to make his plea good shall answer and pay all costs therein, then this obligation shall be void, otherwise of force.

S. S. SMALL (Seal.)
E. H. STEELE (Seal.)
J. M. DONELSON (Seal.)

Signed, sealed and delivered in presence of Harry Lewis and Frank W. Booth.

191 STATE OF MINNESOTA, }
County of Hennepin. } ss.

Be it known, That on this 19th day of May, A. D. 1886, before me personally appeared Sanford S. Small, E. H. Steele and J. M. Donelson,

to me known to be the same persons described in and who executed the foregoing bond, and each for himself acknowleged the same to be his own free act and deed.

FRANK W. BOOTH,
Notary Public, Hennepin County, Minnesota. 192

STATE OF MINNESOTA, }
County of Hennepin. } ss.

E. H. Steele and J. M. Donelson, the sureties named in and who executed the foregoing bond, being first duly sworn, doth each for himself depose and say that he is a resident and freeholder of the State of Minnesota, and worth the amount of $1,000 above his debts and liabilities, and exclusive of his property exempt from execution. 193

J. M. DONELSON.
E. H. STEELE.

Subscribed and sworn to before me, this 19th day of May, 1886.
(N. P. Seal.) FRANK W. BOOTH,
Notary Public, Hennepin County, Minnesota.

(Endorsed on back.)

The within bond, being in the sum and with the sureties by me directed, is hereby approved this 21st day of May, A. D. 1886.
R. R. NELSON, Judge. 194

Filed May 21st, 1886. OSCAR B. HILLIS, Clerk.

UNITED STATES }
Of America. } ss.

The President of the United States to The Northern Pacific Railroad Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota. 195

Wherein, The Northern Pacific Railroad Company is appellee and Sanford S. Small is appellant to show cause, if any there be, why the decree rendered against said appellant in said Circuit Court should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States at St. Paul, Minnesota, this 30th day of April, A. D. 1886. 196

R. R. NELSON, Judge.

STATE OF MINNESOTA, } ss.
County of Hennepin. }

197 Frank W. Booth, being first duly sworn says that on the 22nd day of May, A. D. 1886, at the city of St. Paul, county of Ramsey and State of Minnesota, he served the citation hereto attached upon the appellee therein named, The Northern Pacific Railroad Company, by delivering in hand to and leaving with J. T. Odell, to affiant known to be at that time assistant general manager of said appellee, a true and correct copy of said citation. FRANK W. BOOTH.

Subscribed and sworn to before me this 24th day of May, A. D. 1886.
(Notarial Seal.) JOHN W. PERKINS,
198 Notary Public,
Hennepin County, Minnesota.

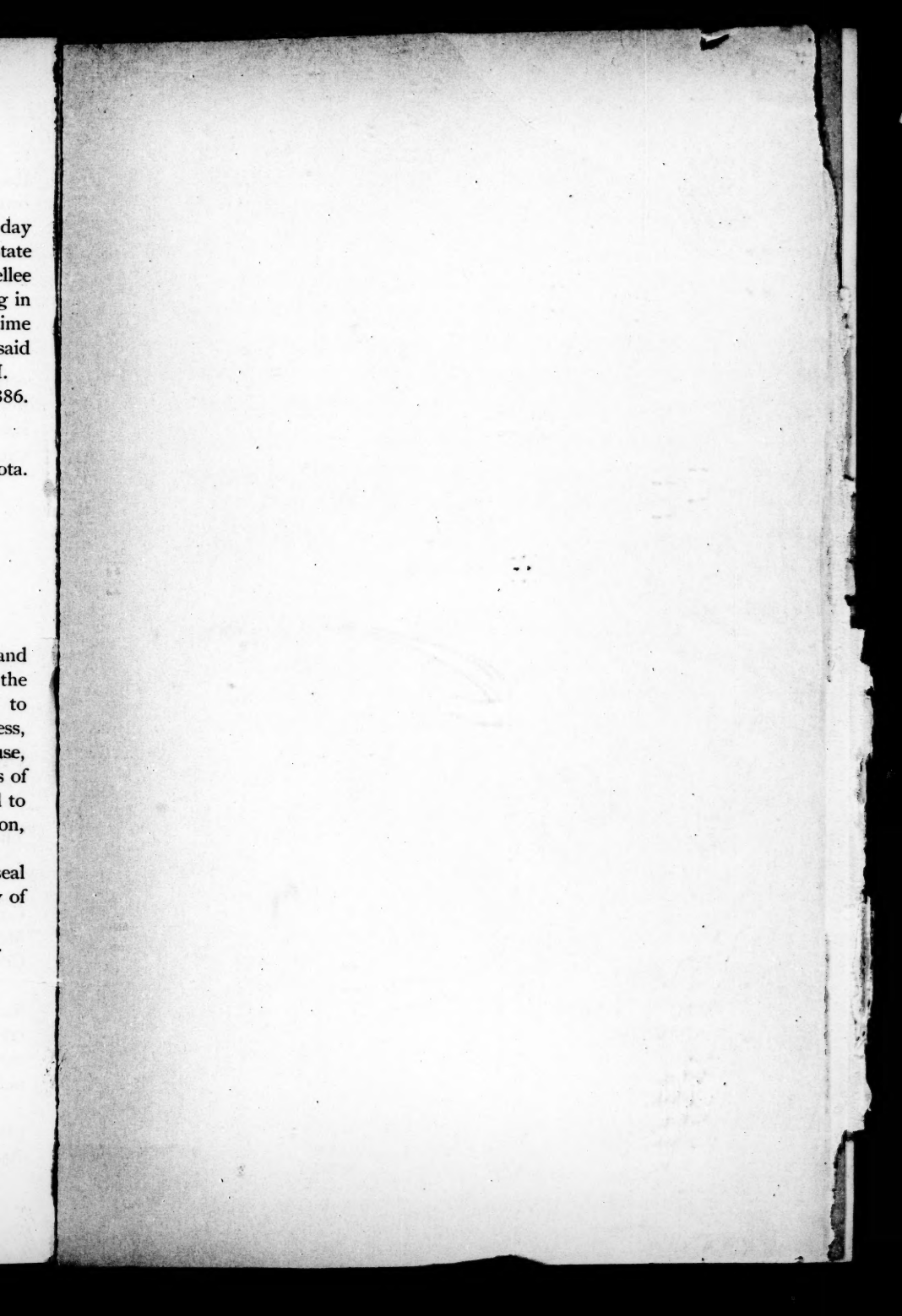
UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES, } ss.
District of Minnesota. }

I, Oscar B. Hillis, clerk of said Circuit Court, do hereby certify and
199 return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of pages numbered consecutively from to inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Final Decree and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal
200 of said Court, at St. Paul, in the District of Minnesota, this day of A. D. 1886.

OSCAR B. HILLIS, Clerk.



Office Supreme Court U. S.
FILED,
JAN 29 1890
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

IN EQUITY.

SANFORD S. SMALL,
Appellant,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Appellee.

Argument for Appellant.

JOHN G. WOOLLEY,
Solicitor for Appellant.

LEIGHTON & HAHN, Printers, 221 Nicollet Ave.

SUPREME COURT
OF THE
UNITED STATES.
} IN EQUITY.

SANFORD S. SMALL, *Plaintiff, Appellant,*

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Defendant, Appellee.*

BRIEF FOR APPELLANT.

This action was commenced in the District Court in and for the County of Hennepin, State of Minnesota, and after issue joined, was removed thence upon the petition of defendant to the Circuit Court of the United States for the District of Minnesota.

The action was brought to enforce the specific performance of an agreement for the sale of lands, entered into at St. Paul, Minnesota, between plaintiff and defendant, on or about March 1, 1880.

The complaint shows:—That defendant is, and during all the time therein mentioned, has been, a corporation duly created and existing under the laws of the United States; that on March 1, 1880, it was seized of a large quantity of real estate, in said complaint particularly described, lying in the county of Traill, Territory of Dakota; that on said day, a contract for the purchase and sale of said real estate was entered into between the parties upon terms and conditions then agreed upon, and that said contract was entire and inseparable.

The terms and conditions of the contract are particularly set forth in the complaint. The price per acre of the land was agreed upon, and it was agreed that the same should be paid in the preferred stock of defendant at par value, within a reasonable time and from time to time, as plaintiff might be able to procure such stock. It was also agreed that as such payments should from time to time be made, defendant would convey to

plaintiff or his assigns parcels of said land commensurate with the amount of such payments. It was also agreed that plaintiff should lay out a town as nearly as practicable in the center of said land, construct thereon a hotel of agreed capacity, establish thereon a grocery store for the convenience of settlers, erect thereon a building for the accommodation of a postoffice, and procure the establishment there of a postoffice by the proper authorities. It was also agreed that plaintiff should break 100 acres of land on each five sections of said land during the breaking season of the year 1881, and that he should, at his own cost, make surveys and field notes of such portions of said land as had not yet been surveyed, amounting to about 50,000 acres. It was also agreed that plaintiff should devote all his time until the whole of said land should be conveyed, to advertising said land and the locality in which it is situate, for the purpose of inducing immigration, and to the sale of said land in small tracts to actual settlers. These terms and conditions were devised and agreed upon for the mutual advantage of the parties to said contract; and, at the time of making said contract, the authorized agent of defendant marked upon the plats of its lands in its land department, as having been sold to plaintiff, all the land described in the complaint.

Thereafter, at divers times, plaintiff paid defendant large sums, in its preferred stock at par value, on account of the purchase price of said land, and defendant thereupon executed and delivered to plaintiff or his assigns warranty deeds for parcels of said land commensurate in quantity with the amount of such payments, in accordance with the terms of the contract. The amount of the payments so made aggregated upwards of $125,000, and the land actually conveyed by such deeds embraced nearly all the land by the contract agreed to be conveyed. As these payments were made, defendant, without suggestion, interposition or demand of plaintiff, selected from the land agreed to be conveyed, and conveyed to plaintiff or his assigns such parcels thereof as it thought fit.

Subsequently, about March 1, 1881, plaintiff demanded from defendant a conveyance of all the said land not theretofore conveyed, upon payment of the purchase price as agreed upon, but defendant refused to make such conveyance, and refused longer to be bound by the contract for the reason, then alleged as the ground for such refusal, that the contract had not been reduced to writing.

Plaintiff, in reliance upon the good faith and honesty of defendant, had, prior to such refusal, at much inconvenience and expense, prepared for the payment of the purchase price of the land not yet conveyed. In like reliance he also fully performed all the agreements and stipulations upon his part to be performed, expending in connection therewith large sums of money and succeeding in procuring large immigration to and permanent settlement upon said land and other land in the same locality. At no time prior to the refusal to convey, on March 1, 1881, did defendant

ever suggest to plaintiff that it was dissatisfied with the contract or with the action of plaintiff thereunder, or that it would not fully execute the same. The land which defendant refused to convey as aforesaid is part of the land which plaintiff surveyed, and of which he made field notes pursuant to the provisions of the contract.

In like reliance upon the good faith and honesty of defendant, plaintiff borrowed money upon the security of said land and expended the same in performing the duties and obligations imposed upon him by the contract.

On March 24, 1882, plaintiff tendered to defendant at its office in St. Paul, Minnesota, in its preferred stock at par value, the sum of $8,715, being the full amount of the purchase price of said land which then remained unpaid, and demanded conveyance of that portion thereof which had not yet been conveyed, but such conveyance was thereupon refused. Plaintiff avers his willingness to pay to defendant said preferred stock and receive a conveyance of said land. He demands a specific performance by defendant of its agreement to convey, and also an accounting for the damages he has sustained by reason of the breach of contract upon the part of defendant, which plaintiff alleges to be $17,000.

For answer to the complaint, defendant admits the conveyances and payments hereinbefore referred to, and admits that it has not conveyed to plaintiff or his assigns the land of which plaintiff demands conveyance. It admits its incorporation as alleged, and its ownership of the land described in the complaint. Except as thus admitted, it denies each and every allegation in the complaint.

ASSIGNMENT OF ERRORS.

I.

The court below erred in giving judgment for defendant, dismissing the bill and awarding costs to defendant.

Depostions in this case were taken upon the part of plaintiff, defendant appearing by counsel and making cross-examination. No witnesses were called by defendant. The witnesses upon the part of plaintiff were plaintiff himself, and James B. Power, who was land commissioner of defendant from 1878 until February, 1881, and who, as such land commissioner, represented defendant in making and carrying out, so far as it was carried out, the contract mentioned in the complaint. The testimony of these witnesses fully sustains the allegations in the complaint.

The testimony of plaintiff himself shows: That the land embraced in the contract of March 1, 1880, included all unsold lands owned by defendant in Towns 144, 145 and 146, Range 55, and in Towns 144, 145 and 146, Range 56, Traill County, Dakota; that the contract was entered into

on behalf of defendant by J. B. Power, its land commissioner; that when the terms of contract had been agreed upon, Mr. Power told Mr. Knowlton, his head clerk, to notify the Brainerd office that the lands had been sold to plaintiff, and instructed him to mark the lands upon the plats as having been sold to plaintiff (fol. 75-77). That plaintiff immediately began the performance of his undertakings, and in pursuance thereof laid out a town named "Hope," near the center of the lands purchased; built in said town a hotel at a cost of $2,500, a store and a blacksmith shop, and procured the same to be operated; built also a postoffice building, and procured the establishment of a postoffice therein; established a stage line from said hotel to Tower City upon the line of defendant's railroad, and paid a monthly bonus of $50 toward its maintenance; advertised the lands and locality by pamphlets and agents; entertained at his own expense persons coming there in search of lands; and had, at the time of defendant's refusal to carry out the contract, secured the improvement of about 25 sections of said land and the settlement thereon of many families. Shortly after building the hotel already mentioned, plaintiffre located the town in the immediate neighborhood of the first location, and at a cost of $25,000 built a new hotel about a quarter of a mile from the one first built. The town, as located and relocated, was about 35 miles from defendant's railroad, and between it and the railroad there was, at the time of location, no settlement whatever; nor were there any improvements within 35 miles. At the time of the refusal of defendant to convey, there were about 50 buildings in the town of Hope and 75 or 100 more in sight on other lands embraced in the contract, and upon government lands in the vicinity. At this time the town of Hope contained several hundred inhabitants. Plaintiff devoted much time and expense to procuring settlement and improvement of these lands (fol. 78, 79).

Up to the close of the breaking season of 1881, plaintiff had broken about 1,000 acres, and on each of five sections he had broken 100 acres. Persons whom he had induced to settle on the lands had also broken 1,000 acres. The breaking was not confined to sections which had been conveyed, but was done without reference thereto (fol. 92.) Some breaking was done in the year 1880 on one of the tracts which has not been conveyed (fol. 117). Plaintiff employed a civil engineer who chained 35 miles from Tower City and located the lands, and he caused surveys and field notes to be made of every quarter section. The land not conveyed was part of the land of which such surveys and field notes were made (fol. 96).

At the time of making the contract Mr. Power told plaintiff that he would mark off the lands agreed to be conveyed, as having been sold to plaintiff; and plaintiff thereafter saw that the lands described in the complaint were marked in his name with a lead pencil upon the land plats of defendant in its land department (fol. 97).

About April 1, 1881, plaintiff called upon R. M. Newport, who succeeded Mr. Power as land agent of defendant, and told him that he wanted the balance of the lands contracted for. Mr. Newport requested time for investigation, and a few days afterward refused to carry out the contract; alleging that the contract was not in writing and that plaintiff could not enforce it. Plaintiff then saw Mr. Oakes, the vice president of defendant, who promised to withdraw the lands from the market and investigate the matter. Plaintiff then waited a reasonable time to hear from Mr. Oakes, but heard nothing further from him (folio 102). Thereafter, on March 27, 1882, plaintiff tendered to R. M. Newport, as land agent of defendant, preferred stock of defendant of the par value of $8,715, being enough to cover the purchase price of the balance of the lands, but conveyance was thereupon again refused, Mr. Newport asserting that no more lands were due plaintiff (fol. 103). At no time prior to the conversation of plaintiff with Mr. Newport, did defendant in any way notify plaintiff of any dissatisfaction with the contract or with plaintiff's proceedings thereunder, or complain of delay, or intimate that it would not convey the remainder of the lands (fol. 108).

Prior to the first conversation with Mr. Newport, plaintiff had conveyed an undivided one half interest in the lands which defendant refused to convey and had given a mortgage upon part of them, the money procured thereby being actually expended in the purchase of preferred stock of defendant with which to pay for the unconveyed lands (fol. 107).

All the acts done by plaintiff as aforesaid were done in reliance upon the contract of defendant to convey all the lands described in the complaint. The lands described in the complaint as unconveyed, have never been conveyed (fol. 112).

It was admitted that a tender of the stock need not be made to the examiner, and that the stock need not be offered in evidence. It was also admitted that R. M. Newport was the proper person to whom to make such tender (fol. 176). Also that Mr. Newport had authority to refuse to convey the lands claimed, that he did so refuse, and that his refusal was the refusal of defendant (fol. 176).

The testimony of James B. Power shows:—That he was land commissioner of defendant from the fall of 1878 until February, 1881, and personally controlled his department (fol. 119); that he had general charge of all lands belonging to defendant, with power to appraise and sell the same, sign all contracts of sale, dispose of lands according to the dictates of his judgment, and receive pay for the same; that no restrictions were placed upon him in regard to the form and manner of making contracts, except that he was subject to instructions from the board of directors and, perhaps, the president (fol. 120); that no restrictions were ever imposed upon him in respect to the form of land contracts, whether they should be written or oral (fol. 122); that under his commission as land commissioner, as he con-

strued it, he had authority to sell the lands of defendant at his discretion, and prescribe the manner and form of making contracts; and that he acted accordingly during all the time he held his office (fol. 124).

The defendant and its board of directors had full knowledge of all sales by means of regular monthly reports (fol. 124); the original agreement with plaintiff was not reported, but the payments thereon were reported from time to time as they were made (fol. 148). It was customary in the business of the department to make agreements of sale of land, which were never reported specifically until sales were completed and payments made, when they were reported in the regular monthly reports (fol. 151). The contract with plaintiff was informally brought to the notice of the president and board of directors of defendant at the office of its president in New York (fol. 157). It was the practice of the department to agree to sell large areas of land; and lands wanted in large tracts were withdrawn from market in order that would-be purchasers might examine them and determine the details of purchase, months sometimes elapsing before such agreement was completed by payment and conveyance. Several instances in point are referred to by the witness. Such agreements were usually informally talked of with the president and board of directors. The president, land committee and board of directors of defendant understood this practice in respect to selling land and never objected to it, and all completed sales upon such agreements were ratified (fol. 168).

The witness, Mr. Power, confirms the testimony of plaintiff in regard to the time, terms and conditions of the contract mentioned in the complaint (fol. 124) and states that, up to the time his connection with defendant ceased, he had satisfied himself that plaintiff had not only fully, but more than fully, carried out his agreements (fol. 134). Mr. Power considered the contract as one which would be of great benefit to defendant, and made it as soon as he became satisfied of plaintiff's ability to perform his agreements (fol. 128).

The lands agreed to be conveyed were all the unsold lands in certain townships; they had not been examined by defendant and no field notes had been made of them (fol. 130). It was not understood that every particular tract purchased should be improved, nor were any sections designated upon which improvements were to be made. Improvements were to be made within the limits of the territory purchased, the particular locality to be selected by the purchaser (fol. 133). There was no designation of any particular part of the land for a town, though it was understood that the settlement of the land would necessitate a town (fol. 136).

All the lands that were agreed to be sold to plaintiff were marked upon the sales plats in the office of the defendant's land department, by his name being written across the sections and parts of sections. This was done as soon as the contract was completed. These designations were intended to include all the lands sold to plaintiff and probably did so (fol. 137).

From time to time as preferred stock was brought in by plaintiff, Mr. Power made certificates of sale for the area that would be covered by such payment. The particular lands described in such certificates of sale were designated by Mr. Power, except in some cases where plaintiff selected particular tracts which he had already sold. It was understood that Mr. Power should make the selections generally. It was sometimes difficult to fit an exact amount of stock with a specified area, and large amounts of stock often remained in the hands of defendant until balances could be procured to make payment for a given area. Government subdivisions were never divided. Certificates of sales were given to plaintiff, and formal deeds were subsequently delivered.

"Exhibit A," being a correct copy of the resolution of the board of directors of defendant, adopted September 25, 1879, appointing J. B. Power as land commissioner of defendant, shows that Mr. Power was entrusted with the care, management and disposition of these lands. This Exhibit was admitted to be a correct copy of the resolution (fol. 146).

Plaintiff testified that when he entered into the contract he knew that the land commissioner of defendant was accustomed to make verbal contracts, similar to the one under consideration, with other purchasers of defendant's lands (fol. 175).

The circumstances of this case present so just a claim to relief that it is difficult to conjecture upon what principle or precedent the defendant bases its resistance. There is (1) possession under the contract, actual, open, visible, notorious, definite and exclusive, taken and held with the consent of the defendant; (2) valuable improvements made in pursuance of, and in reliance upon, the contract; improvements made irrespective of the fact that the lands improved had or had not been conveyed, and made with the single view of improving the value of the entire body of land purchased; and (3) a full and complete tender of performance upon the part of the plaintiff. These additional facts are also worthy of note: that the lands actually conveyed to the plaintiff were, for the most part, selected from the general body by the defendant, at its own option; that at no time prior to the final refusal by the defendant to perform, was any dissatisfaction expressed in respect to the acts of the plaintiff under the contract; that prior to said time and while valuable improvements were being made by the plaintiff with the knowledge of the defendant, no intimation was ever given that the defendant would for any reason refuse to carry out its contract; that the contract was of great benefit to the defendant; and that, as shown by Mr. Power, the plaintiff not only fully, but more than carried out his agreements.

There can be no question in the case as to the right of Mr. Power to act for the defendant in making the contract. It appears by Exhibit A

that the defendant confided to him "the preservation, protection, care, management and disposition of the lands belonging to the Company, or in which it shall be interested, except lands within the right of way or used in connection with operation of the road," within the department for which he was land commissioner. It also appears that no restrictions were ever imposed upon him in respect to the form or manner of making contracts for the sale of lands. It was moreover a well established practice of the department, well known to the President and Directors of the defendant, to make verbal sales of large tracts of lands, which were often not completed by payment and conveyance until months after they were made. The testimony of Mr. Power shows that he had authority to sell and dispose of the lands of the defendant at his discretion, and to prescribe at his discretion the manner and form of making contracts for such sales; that he so construed his authority, and acted accordingly during his whole term of office. There is nothing in the evidence to indicate that Mr. Power misconceived the extent of his official authority. Whether he did or not, however, is unimportant. In his capacity of land commissioner, he was clothed with an apparent authority which, so far as this present controversy is concerned, was a real authority, which the defendant cannot, and which it has not attempted to deny. Whether or not Mr. Power made such reports to his principal, respecting the business of his department as were contemplated by his instructions, it is unnecessary to inquire. If he had authority in the first instance to enter into the contract upon behalf of his principal, the performance or non-performance of his duty thereafter in respect thereto, is a matter of no concern to the plaintiff. It is certain, so far as contains the present controversy, that Mr. Power possessed all the authority which he assumed to exercise.

The only ground of defense taken in the court below was that the contract was void under the statute of frauds.

I.

In Great Britain, and in almost all the States of this Union, the rule is well settled that, in equity, part performance takes a parol agreement out of the operation of the statute of frauds. Jurisdiction to this end has been constantly asserted by the courts of Minnesota; *Gill. vs. Newell, 13 Minn. 462; Place vs. Johnson, 20 Minn. 219; Pfiffner vs. Railroad Co., 23 Minn. 343.* Indeed, the legislature of this State, recognizing the existence of the rule and its justice, has specifically provided that nothing contained in the provisions of the statute of frauds shall be construed to abridge the power of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements; *Genl. Stats., 1878, Chap. 41, § 13.*

This, then, being the rule which guides the courts of this jurisdiction, it is difficult, in view of the undisputed facts of this case, to surmise the precise ground upon which the defendant bases its resistance to the relief demanded. The most probable ground seems to be this :—that the land sold is not a continuous, solid tract, that the plaintiff has not in fact taken actual possession of every part thereof, and that possession of part is not, under the circumstances, such part performance in respect to the other parts not actually possessed, as will take the contract, in respect to such other parts, out of the operation of the statute. If this is the true ground of resistance, it rests upon a misconception of the principle upon which courts of equity act in decreeing specific performance in cases where there has been part performance. Defining this principle of action, Judge Story says: "The distinct ground upon which courts of equity interfere in cases of this sort, is, that otherwise one party would be able to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statutes are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice." *Story Eq. Juris.* § *759.* In *Sugden on Vendors, 151 Marg.*, it is said: "There are other cases taken out of the statute, not so much on the principal of no danger of perjury, as that the statute was not intended to create or protect fraud. Lord Thurlow laid it down that 'If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, the case would be taken out of the statute.' So, where agreements have been carried partly into execution, the court will decree the performance of them in order that one side may not take advantage of the statute to be guilty of fraud." Mr. Pomeroy asserts the same principle as the basis of jurisdiction. He says: "The theory upon which equity proceeds in administering its specific relief in such cases is, that the defendant having permitted the plaintiff to treat the agreement as binding, and to do positive acts based upon such assumption, it would be a fraud in him to repudiate his undertaking, and to set up the statute as an obstacle in the way of its completion." *3 Pom. Eq. Juris.* § *1297, note.* Indeed, there is no dissent in respect to the principle which underlies the jurisdiction of courts of equity in such cases, and to multiply citations from text writers would be merely to variously express the same principle. The cases support this statement of the principle, with entire uniformity. It will be sufficient for our present purpose to refer to a few cases of authority.

In *Bond vs. Hopkins, 1 Sch. & L. 433,* Lord Redesdale uses the following language, "The statute of frauds says that no action or suit shall be

maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief." In *Mundy vs. Joliffe, 5 My. & Cr. 177*, Lord Cottenham says, "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been a part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party has, upon the faith of such engagement, expended his money, or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected." In *Parkhurst vs. Van Cortlandt, 1 John, Ch. 274, 284*, Chancellor Kent says, "The ground of relief in chancery is the fraud in permitting a parol agreement to be partly executed, and in leading on a party to expend money in the melioration of the estate, and then to withdraw from the performance of the contract." Similar language is used by Lord Cranworth in *Caton vs. Caton, L. R. 1 Ch. 137, 147*, as follows: "The ground on which the court holds that part performance takes a contract out of the provisions of the statute of frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract—as, for instance, by taking possession of land and expending money in building, or other like acts,—then it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money." In *Pfiffner vs. Railroad Co., 23 Minn. 343*, the court asserts the same principle, as underlying the jurisdiction of courts of equity in cases where there has been part performance, and approves the following language used in *Browne on Frauds, § 448*, "The doctrine of equity in such cases is that where an agreement has been so far executed by one party, with the tacit encouragement of the other, and relying upon his fulfillment of it, that, for the latter to repudiate it, and shelter himself under the provisions of the statute, would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement."

The conditions of a part performance are briefly stated in *Wright vs. Pucket, 22 Gratt., 374* as follows: "1. The parol agreement relied on must be certain and definite in its terms. 2. The acts proved in part performance must refer to, result from, or be made in pursuance of, the agreement proved. 3. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. Where these three things concur, a court of equity may decree specific performance."

It is upon the same principle that courts of equity habitually decree conveyances of land, absolute on their face, but intended as securities for money, to be mortgages; rescind or cancel contracts, conveyances or judgments tainted by fraud; and reform written instruments improperly drawn through fraud. The principle in its broad generality prohibits statutes and legal rules designed to prevent fraud, from being so applied as to promote fraud, and demands that fraud shall be prevented, relieved against or punished, in whatever form or under whatever guise it may appear. It simply says that a man shall not be permitted to use a statute, more than any other assistant, for the purpose of promoting his own fraudulent intents or defending his own fraudulent conduct. The true theory upon which courts have proceeded in applying the principle is stated by Lord Westbury in *McCormick vs. Grogan, L. R. 4 H. L. 82, 97*, as follows: "The court of equity has, from a very early period, decided that even an act of parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud, an act of parliament intervenes, the court of equity, it is true, does not set aside the act of parliament, but it fastens on the individual who gets a title (or right) under that act, and imposes on him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds."

In respect to the same principle Mr. Pomeroy says: "When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relation of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract, and thus to secure for himself all the benefits of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for its failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract by decreeing its specific execution." *Pomeroy on Spec. Perf.*, § *104*.

Among the arguments which courts have frequently used in support of their jurisdiction to decree specific performance in case of part performance, is the argument that the purchaser who takes possession under a parol contract would be liable as a tresspasser unless the contract should be specifically enforced. As was said by Lord Redesdale in *Clinan vs. Cooke, 1 Sch. & L. 22, 41:* "If upon a parol agreement a man is admitted into

possession, he is made a trespasser if there be no agreement. This is put strongly in the case of *Foxcroft vs. Lester;* there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong doer, and to account for the rents and profits; and why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout." This ground of jurisdiction has been frequently asserted, and it has also been frequently criticised, but it is clearly tenable as strengthening and sustaining the more general and conclusive argument based upon the principle of fraud. The argument does not deny that a parol license is a protection, but it assumes that, in order to avoid himself of the license, the purchaser must prove the contract, and that thereupon the court will give effect to the evidence for all purposes. Nor does the argument assume that a specific performance is decreed wholly because the purchaser would otherwise be made a trespasser. The fact that he would generally be a trespasser is one of the facts upon which the courts originally based their jurisdiction, but it has never been held that in the particular case the purchaser must show that, unless specific performance be decreed, he would be a trespasser. The argument is a mere theory, auxiliary to the main principle of fraud, and this is obvious from the fact that in the action to compel specific performance no question can be made as to whether or not the purchaser is in fact a trespasser, so as to hold him liable for rents and profits or impose upon him any other liability. Now, in this case it is a fact that, but for the contract in suit, the plaintiff would be a trespasser, inasmuch as he entered upon and surveyed all the lands embraced in the contract and broke portions of the land, some of which have not yet been conveyed. He also occupied and improved other portions of the land embraced in the contract, before he had received any conveyance thereof from the defendant. The extent to which the plaintiff would be a tresspasser, but for the contract, or the measure of damages to which he might be subjected, it is unnecessary to inquire. For the reasons already stated, it is unnecessary even to inquire whether or not he would be a trespasser.

The strongest argument upon which the intervention of a court of equity is usually invoked in cases of part performance, is based upon the expenditures and improvements made by a purchaser, in reliance upon the contract. Says Mr. Pomeroy, "The making of valuable permanent improvements on the land by a vendee or lessee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell and convey, or to lease, is taken out of the statute. It is very plain that such proceedings satisfy the equitable principle upon which the doctrine of part performance rests, much more completely than

a mere possession does. If the purchaser has simply taken possession, it might seem possible for him to be restored to his former situation, and to be compensated in damages; but when he has made outlays for valuable and permanent improvements and thus changed the character of the property, it would be in the highest degree unjust for the owner, who has permitted these expenditures and alterations to be made in reliance upon the agreement, to interpose the statue and prevent the completion of his contract, and at the same time retain and enjoy all the benefit of the additional value imparted to his land. For these reasons the courts have never hesitated to assert and enforce the rule as above stated." *Pomeroy on Spec. Perf. Sec. 126.* As Mr. Pomeroy further points out, "No acts more clearly indicate a proprietorship in the purchaser, and therefore point more unequivocally to the agreement from which such proprietorship arises, than the making of valuable and permanent improvements on the land; and this result is evidently the same, whether the improvements were stipulated for or not; indeed, the making improvements, when the contract was utterly silent in reference thereto, is perhaps the more emphatic assertion of the purchaser's interest, of his equitable estate, and of his purpose to carry the agreement into effect." *Ibid, Sec. 127.*

In *Pfiffner vs. Railroad Company, 23 Minn. 343,* the court, after referring to the fact that the most frequent cases in which courts interpose to prevent fraud, by compelling performance, are those where possession has been taken under the agreement, in which, if the agreement be disregarded, the party taking possession will be made a trespasser, says, "These cases, however, are not the measure of the rule, but only instances of its application. Rendering a party liable as a trespasser, by repudiating an oral agreement with him, cannot be a greater fraud than subjecting him, by such repudiation, to the loss of improvements." The court also approves the following language used in *Browne on Frauds,* § *487:* "The propriety of admitting this expenditure of money in improvements, as a reason for enforcing the contract, is, perhaps, more clear upon the equitable view of preventing fraud, than is that of admitting the taking or delivering of possession."

Now, in this case it is to be observed that the improvements made by the plaintiff, and his divers expenditures, were for the benefit of all the lands purchased. The expense of survey, of breaking land, of advertising the land and soliciting immigration, of laying out the town, of establishing and maintaining a stage line, of entertaining land seekers, of constructing the two hotels, was undertaken with a single view to the complete performance of the contract. Mere payments of purchase money have never been held by the courts to be acts of part performance, not because there would not be fraud in withholding performance, but because such money might be returned and the purchaser placed in his original position. Another reason is, that the clause of the statute of frauds concerning the sale of

goods and chattels, expressly provides that the receipt of the price, or a part thereof, shall render a verbal contract binding, and it is argued that, by omitting any similar provision from the section relating to lands, the legislature indicated its intent that such payment shall not avail in the case of a verbal contract for the sale of lands.

Now, it is obvious that the arguments used against the propriety of considering the payment of purchase money such part performance, as should take the case out of the statute, can have no application to the various expenditures made by the plaintiff in pursuance of his contract. The conveyance of all the land embraced in the contract was necessary to his purposes, and his expenditures were graded and measured with a view to complete performance. The lands which the defendant has refused to convey were presumably as much benefited by the labors, expenditures and improvements of the plaintiff as those which have in fact been conveyed. So, too, neighboring lands belonging to the defendant have reaped a share of the benefits which the enterprise and industry of the plaintiff have conferred upon the land embraced in the contract. It would not be possible now to restore the plaintiff to his original position, or to adequately compensate him in damages. To retain from him any portion of the land purchased would clearly be a fraud upon him. Unless specific performance be decreed, he must lose the benefit of his labors, expenditures and improvements, so far as they relate to the unconveyed lands, and be content with an inadequate and limited performance, when he had a right to rely upon the complete performance of an entire and inseparable contract.

In view of the considerations to which we have adverted, there should be no doubt that the plaintiff is entitled to the relief of specific performance. As is said by Mr. Pomeroy, "When, for example, a vendor of land, under a parol agreement, knowingly permits the purchaser to take possession, to make payments upon the price, and to expend money in permanent alterations and improvements, and thus to render it impossible for the parties to be restored to their original situation, such vendor cannot complain if a court of equity, not being able to ascertain the exact amount of damage, grants to the purchaser the relief of a specific execution, and thus causes the effects of the wrong to recoil upon its author." *Pomeroy on Spec. Perf., Sec. 103.* As is said by Vice Chancellor Shadwell in *Duke of Leeds vs. Earl of Amherst, 20 Beaven, 239, 242,* "The author of a mischief is not the party who is to complain of the result of it, but he who has done it must submit to have the effects of it recoil upon himself. * * * Where a wrong has been done, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of damage."

The specific argument upon which the defendant probably relies to resist performance in this case is, that the acts of part performance alleged and proven do not clearly prove the contract alleged and proven Some cases have gone so far as to hold that it is not sufficient that the acts

of part performance merely show the existence of *some* contract, but that they must themselves be evidence of the very contract which the plaintiff seeks to enforce. In criticising this doctrine Mr. Pomeroy says, "In the vast majority of cases the evidence establishing the part performance, and the acts of part performance themselves, when established do not, and in the nature of things cannot, fully show what are the terms of the agreement alleged and relied upon by the plaintiff, nor are they introduced for any such purpose. The judicial opinions which, in unguarded and careless language would require the acts of part performance to prove the exact contract as alleged, are in this respect clearly erroneous. The true rule is, that the acts of part performance must be such as to show that some contract exists between the parties; that they were done in pursuance thereof, and that it is not inconsistent with the one alleged in the pleading. Whenever acts of part performance are made out which point to *a* contract, the door is opened, and the plaintiff may introduce additional parol evidence directed immediately to the terms of *the* contract relied upon." *Pomeroy on Spec. Perf. Sec. 107.* In a note, the learned author points out the fact that the decisions criticised may have resulted from a misunderstanding or misapplication of the language used by Sir William Grant in *Frame vs. Dawson, 14 Vesey 386,* that the part performance must be "an act unequivocally referring to and resulting from the agreement;" by giving an undue force to the article "the;" *the* agreement. It seems to us singular, however, that such misunderstanding or misapplication should have ever occurred, inasmuch as Sir William Grant in that case takes precisely the position for which we now contend. He says: "The principle of the cases is, that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is."

In the same note, the learned author points out the fact that if the rule asserted by the cases criticised were the true rule, then the whole doctrine of enforcing a verbal contract, which has been part performed, would rest upon a most vicious reasoning in a circle, since the acts of part performance would be relied on to prove the agreement, while their character *as* acts of part performance would at the same time be proved by the agreement. A similar view of the matter is taken in *Browne on Frauds,* § *455,* where the following language is used: "It has been sometimes laid down that the acts of part performance, in order to avail a plaintiff seeking relief by specific execution, must be such as unequivocally *prove* the contract alleged. And, upon this view, it has been remarked by Mr. Roberts that the entire doctrine of enforcing a contract in equity on the ground of part performance, proceeds in a circulating course of reasoning; that it *assumes* the existence of the contract, inasmuch as the acts must have been done with a direct view to perform a particular agreement, and that thus the acts relied on prove and are proved from the agreement at the same time; and

he adds that 'to call anything a part performance, before the existence of the thing whereof it is said to be the part performance is established, is an anticipation of proof by assumption, and gets rid of the statute by jumping over it; for the statute requires proof, and prescribes the medium of proof.' So far as this view tends only to prove general unsoundness in the equitable doctrine of part performance, it would be of little practical importance to discuss it, now that the doctrine is so firmly rooted in the jurisprudence of both England and our own country. But it seems to confound two branches of that doctrine which are, and it is most material should be, kept entirely distinct; namely, the use of parol evidence to prove the terms of the contract, and the use of parol evidence to prove part performance. The latter evidence is that which, in such cases, is required to be first introduced. It is manifest that the two classes of evidence cannot be required for proving precisely the same thing. If the acts of part performance prove the whole contract, there is no occasion for any parol evidence of its terms, and no difficulty whatever arises under the statute of frauds. It is true, the acts relied on must ultimately appear to have been done in pursuance of the contract sought to be enforced, or the whole equity of the plaintiff fails. But they are not put in evidence to prove what that contract is, that being the office of the parol evidence to which the proof of them opens the door. They are put in evidence, in the first instance, to show that the parties have entered into *some contract*, and they must be such as clearly to show that fact."

These criticisms upon the doctrine that the acts of part performance must themselves prove the contract alleged, are very apt and convincing. The cases which hold this doctrine are not numerous, and it may be safely said not only that they are opposed to the great preponderance of authority, but that they are opposed to the true principle which has always guided courts of equity in respect to this branch of their jurisdiction. An additional criticism is this, that so far as these cases assume to describe the effect which must be produced by the evidence introduced to prove acts of part performance, without any further evidence directed expressly to the agreement, they in fact require an impossibility. For illustration, let us take the simplest case imaginable,—the case of a person who has entered into possession of land and made improvements, with the knowledge of the owner. Upon this state of facts a court would be justified in assuming that some contract had been entered into between the parties; but what contract? Has the person in possession entered under an agreement for sale or for lease? If under an agreement for sale what is the consideration; what are the terms of sale; when is the consideration payable; and when is the agreement to be consummated by conveyance? If under an agreement for lease, what is the length of the term; what is the amount of annual rental reserved; what are the respective undertakings between lessor and lessee? It is obvious that neither possession nor im-

provements could in any way demonstrate the contract. Yet it is the contract as made between the parties which courts of equity establish. They never make for the parties a contract, upon the basis of a conjecture arising out of the proven facts of part performance alone, and compel the parties to accept it. Such action would be tyranny and not equity. In fact the doctrine upon which these cases are based is wholly indefensible, and inconsistent with the habitual practice of the courts. For instance, courts of equity have habitually decreed specific performance of parol leases according to their terms; an exercise of jurisdiction impossible under the theory which we are now criticising. If the courts, regarding facts of possession and improvement, will receive parol evidence as to whether the agreement underlying them was one of sale or lease; if in case of parol sales, they will receive evidence as to the consideration, terms and conditions of sale; if, in case of parol leases, they will receive evidence as to the term, the rental, and the respective undertakings of the parties; and if they will enforce specific performance in accordance with such evidence, addressed directly to the terms of the contract; there is no reason in principle why they should not receive evidence as to the amount of land embraced in the centract, and as to all other matters affecting the contract. On the other hand there is every reason why they should receive such evidence; for, evidence of some of the terms of a contract, to the exclusion of others, would be of no avail. In order to the specific enforcement of a contract, its terms must be made manifest to the court, and if wise policy admits parol proof of a portion of its terms, the same wise policy demands that it be proved in its entirety. Without such complete proof, it would be impossible for the courts to decree specific performance in any case.

The correct rule is admirably stated by Vice Chancellor Shadwell in *Dale vs. Hamilton, 5 Hare 369*, as follows: "It is generally of the essence of such an act (of part performance) that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. Of this a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that *some* contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part performance." So, in *Jones vs. Peterman, 3 Serg. & Rawle, 543*, Mr. Justice Gibson says: "It is not true that the act relied on as part performance must indicate the nature and extent of the contract. It is sufficient if in its nature it imply *some* agreement. Where there has been an execution of some agreement between the parties, parol evidence will be admitted to explain it."

Parkhurst vs. Van Cortlandt, 14 Johnson 15, is a very remarkable

case in illustration of this principle. The facts are too intricate to admit of full statement in this connection. It is sufficient to say, however, that the plaintiffs were in possession of the land, and had made valuable improvements with the knowledge and consent of the owner. The terms of the parol contract set forth in the bill were disputed by the answer, and parol evidence of several witnesses was heard for the purpose of determining the terms of the contract. The contract was proved with requisite certainty, and was as follows, as stated in the opinion of the court (*p. 37*): "either to sell the land as wild land was selling in that part of the country in the year 1797, together with the interest, or to give a durable lease in fee, at the customary rent at that time, at the election of appellants." On the original hearing before the chancellor, a decree was pronounced for plaintiffs, for a lease in fee of the land, upon the customary rents of lands, alike situated in the same patent; and such rent being reported, a final decree was entered accordingly; which, upon rehearing, was set aside. Upon appeal by plaintiffs, however, the court of errors decreed specific performance. The court, considering the principle that from the fact of part performance an agreement may be presumed, says: "If, then from the fact of part performance, we are authorized to presume some agreement between those parties in relation to the land, what that agreement was may be collected, with all reasonable certainty, from the parol proof."

Allen vs. Bower, 3 Brown, C. C. 149, was a bill to enforce specific performance of a parol agreement for a lease. The written promise of a lease was imperfect, and Lord Thurlow referred it to a master to supply, by parol evidence, the term, rent, &c., which were wholly omitted in the writing; though the evidence of fraud was slight, resting on an expenditure with the owner's consent.

In *Lester vs. Foxcroft, 1 Colles, P. C. 108*, the highest tribunal of England decreed specific performance of a parol agreement for a lease for 99 years, at a peppercorn for the first year, and 150 l. yearly rent for the last 98 years; holding that it would be against conscience to suffer a party who had entered and expended his money on the faith of a parol agreement, to be treated as a trespasser, and for the other party, in fraud of his engagement, though it was verbal, to enjoy the advantage of the money laid out.

In *Toole vs. Medlicott, 1 Ball & B. 393*, the bill stated a parol agreement for a lease of land for the term of three lives (to be named by the plaintiff) or 31 years, at an agreed rent; and averred that, on the faith of the agreement, the plaintiff went into possession and made valuable improvements, with the knowledge and approbation of the defendant. The defendant, by answer, admitted that the plaintiff had proposed a lease for 31 years, at the rent stated in the bill, but denied that he had assented to it unless upon the terms that the plaintiff should give security for the payment of the rent. He averred that the plaintiff, having promised to give

such security, had been suffered to go into possession as tenant at will, and that the plaintiff paid rent as such, and not under the agreement stated in the bill. The defendant further averred that the plaintiff had never offered to give security for the payment of the rent; and he insisted on the statute of frauds. The evidence of several witnesses was heard, to prove the terms of the contract. The plaintiff relied upon the principle that the delivery of possession and expenditure of money in improvements, were such acts of part performance as took the case out of the statute of frauds and admitted parol evidence to prove the contract. The court decreed that the defendant should execute to the plaintiff a lease for the term of 31 years, at the rent stated in the bill, on the plaintiff giving to the defendant security for the due payment of the rent. The court says: "Where a plaintiff proves he had possession delivered to him under an agreement, and on the faith of that has expended money in permanent improvements, he is, according to the best of my judgment, entitled to go into parol evidence to prove that agreement; this appears to me to be the result of all the decisions on the subject of part performance"

In *Savage vs. Carroll, 1 Ball & B. 265*, the agreement for the sale of land was not in writing, but it was insisted that there were acts of part performance which took the case out of the statute, and entitled the defendant to enter into parol evidence of the terms of the contract. The acts relied upon for that purpose were the taking possession of that part of the lands that were out of lease, erecting a lime kiln, digging the foundation of a house, preparing material, and employing workmen. It appeared that possession was given of only eighteen acres of the land, which was then out of lease, and that other portions of the land were in the occupancy of tenants. The court says, "Now, whether the possession be an unequivocal act, amounting to part performance, must depend upon the transaction itself, whether it be so circumstanced that it can refer only to a contract of sale; if it be so, the party may go into evidence of the terms of that contract." After referring to the opinion of Lord Rosslyn in *Wills vs. Stradding, 3 Vesey 378*, to the effect that the delivery of possession by a person having possession to another claiming under an agreement, is a strong and marked circumstance, the court adds, "Here, I think it is such a delivery of possession, accompanied by the other circumstances, as refers to a contract of sale, and would render it a fraud in either party to recede; the evidence, then, of the terms of the contract is in my opinion admissible."

Gregory vs. Mighell, 18 Vesey 328, was a bill to enforce the specific performance of a parol agreement for a lease. The bill stated an agreement for a lease of premises for a term of twenty-one years, at a fair and just annual rent, to be determined by arbitration; taxes and necessary repairs to be borne by the tenant. It further averred that the plaintiff had entered and continued in possession

on the faith that such lease would be made, and had cultivated, and been at considerable expense for manuring, &c.; also, that he had paid the taxes incurred since his occupation. It also averred a refusal by the defendant to sign arbitration bonds, and a refusal by the arbitrators to proceed without such bonds. The defendant answered that the agreement stated in the bill was not the agreement which was in fact made; denied knowledge of the expenditures, &c.; and insisted on the statute of frauds. Evidence was heard which supported the allegations of the bill, with slight variations which the court deemed immaterial. Specific performance was decreed, and the cause sent to a master to ascertain and report what would have been a fair rent of the premises upon a lease for twenty-one years from the time of the agreement.

Morphett vs. Jones, *1 Swanston 172*, was a bill to enforce the specific performance of an agreement for a lease. The bill stated a parol agreement for the lease of certain premises for the term of twenty-one years, at an annual rental of 400 l., and an entry into possession by permission of the defendant. It also stated that afterwards, by agreement between the parties, the plaintiff gave up part of the land, and it was agreed that the plaintiff should continue tenant of the residue, for the residue of the term, at the reduced rent of 150 l. The bill further stated that the plaintiff continued in possession, paid rent, and expended large sums in improvements on the faith of the agreement; and that the defendant had given him notice to quit, before the expiration of his term. Whereupon, he prayed specific performance according to the terms of the agreement. The defendant, by answer, admitted that he had agreed that the plaintiff might become his tenant, but he denied that any duration, or the commencement, or termination, or the rent, of any lease was ever agreed upon or ever mentioned in any way between him and the plaintiff. He averred that the plaintiff was let into possession as tenant from year to year, without reference to any lease or agreement for a lease, denied the expenditures alleged, and insisted on the statute of frauds. Evidence was received to prove the terms of the agreement, and the court decreed specific performance, saying, "The ground on which the courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed."

In Munn vs. Fabian, *1, L. R. Ch. App. 35*, a landlord, having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one-quarter's rent at the increased rent and expended a considerable sum of money in improvements, in reliance upon the agreement. The court decreed specific performance. Lord Cranworth says, "This is a bill for the

specific performance of an agreement for a lease for twenty-one years. The agreement was by parol, but the plaintiff seeks to avoid the statute of frauds by an allegation of part performance. Now, I should yield to no judge of a court of equity in my desire to refrain from extending the cases in which the court gets over the statute of frauds; but there being an established rule on this subject, a judge ought not to depart from it. The court is bound to consider, first, whether there was a parol agreement; and secondly, if so, whether there has been part performance of it; and then, if there has been part performance, it is the duty of the court to act upon the established principle, and to decree performance of the contract."

Mundy vs. Joliffe, 5 My. & Cr. 167, was a bill by a tenant against his landlord to enforce specific performance of a parol agreement to grant a lease for fourteen years. At the time of the agreement the plaintiff was tenant from year to year. Pursuant to the parol agreement, the plaintiff drained the land, put a piece of arable land into pasture, and repaired the buildings. Upon proof of the agreement Lord Cottenham decreed specific performance, saying there was no doubt of the part performance.

In Sutherland vs. Briggs, 1 Hare 26, the plaintiff was lessee of a house and other premises for a term of 31 years at a rent of 60 l., and was under covenant to make certain improvements upon the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of 9 l. The lessor of the house became purchaser of the meadow, and by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the meadow, and part of the meadow was attached to the demised premises; the plaintiff paying about half the expense of the alterations, which far exceed the amount he had originally covenanted to lay out, and also signing a memorandum which the lessor drew up, whereby he agreed to pay an entire rent of 80 l. for the consolidated property. The bill prayed a decree that the plaintiff was entitled to the tenancy and occupation of the whole meadow during the term of the lease. The equity upon which he rested his case, was his expenditure of money upon the faith of the agreement. It was suggested upon argument that the plaintiff being in possession of the meadow as tenant from year to year, the expenditure did not unequivocally show that it proceeded upon an antecedent contract with the landlord. Upon this point, the court says, "Undoubtedly, it is in general necessary that an act of part performance, which is to take a case out of the statute of frauds, should unequivocally demonstrate the existence of some contract to which it must be referred. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient." It was also sug-

gested on argument that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. Upon this point the court says, "If the acts done by the plaintiff are to be considered acts of part performance, taking the case out of the operation of the statute, the rules of the court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement, namely, the meadow, and not that part of it only upon which the house stands."

In *Eaton vs. Whitaker, 18 Conn., 222*, the court specifically enforced a verbal agreement for a lease, upon proof that the plaintiff had entered into possession and paid rent.

In *Place vs. Johnson, 20 Minn., 219*, the plaintiff, being the lessee of land and in possession of it under the lease, entered into a verbal agreement with the lessor, whereby the lessor agreed, upon certain terms, to convey to her the land at any time within five days after the expiration of the term. Before the expiration of the term, the plaintiff notified the defendant that she would purchase, upon the agreed terms, and demanded a deed. Thereafter, she continued in possession. The court held such possession to be part performance, sufficient to take the case out of the statute of frauds.

The cases which we have cited seem to sufficiently establish the doctrine upon which we rely, namely, that if the acts of part performance shown, unequivocally demonstrate that some contract was entered into between the parties, parol evidence is admissible to show the precise terms of the contract actually entered into. They also establish a great weight of authority against the doctrine which we have taken occasion to criticise, that the acts of part performance must themselves prove the contract. There are many other weighty cases in support of the doctrine for which we contend, but we have not deemed it necessary to go further into citation, relying upon the authority of the eminent judges who have sustained the doctrine and to whose decisions we have already referred. But there are some cases which more nearly touch the precise question at issue, and to which we deem it proper to refer.

Mr. Pomeroy says that "where several distinct parcels are sold to the same vendee by one entire contract and for a gross price, the rule, as generally adopted, makes the proper possession of one parcel a sufficient part performance as to all." *Pomeroy on Spec. Perf., Sec. 122.* This principle was adopted in *Smith vs. Underdunck, 1 Sandf., Ch. 279*, where the court says, "I find no authority which requires the buyer to take possession of all the lands sold, in order to make such a part performance as will establish a parol agreement for their sale. The reason assigned for giving this effect to the act of taking possession is as applicable to entering into a part of the land sold, as it is to an entry into the possession of

the whole." The principle is also asserted in *Browne on Frauds*, § 475, where the following language is used: "Possession of a tract of land must generally be, from the nature of the case, a possession of part only as representing the whole. Moreover, the reason upon which, as we have seen, it is admitted in any case as a ground for the specific execution of the contract at the suit of the purchaser is, that by entering he has made himself liable in trespass, a result which is in no wise dependent upon the extent of his possession. So long, therefore, as the contract under which possession is claimed to have been taken or delivered is an entire contract, though the land consist of several parcels, it would seem more reasonable to hold that possession of one of such parcels was equivalent to possession of the whole." In *Buckmaster vs. Harrop*, 7 *Vesey 341*, where several lots of land were sold by distinct agreements, Sir William Grant held that part performance by taking possession of one of such lots, could have no efficacy to relieve against the operation of the statute as to any but that particular lot. He leaves it to be inferred, apparently, that where several parcels are sold together, at one transaction, and for a gross price, it would be otherwise.

The only case we have been able to find which conflicts with this rule is the case of *Allen's Estate*, 1 *Watts & S. 383;* but the determination of the court in that case is readily explicable, in view of the peculiar provisions of the statue of frauds of Pennsylvania, and the habitual reluctance of the courts of that State to apply the doctrine of part performance in any case. By the statute of Pennsylvania it is provided that all estates created by parol shall have the force and effect of estates at will only. The fourth section of the English statute does not appear in any form in the law of Pennsylvania. The statute thus limits the operation of the contract, leaving the party who refuses to perform it liable to be sued, and made to respond in damages. The statute of frauds of Pennsylvania was enacted in the year 1772, and, in the earlier cases, question was frequently made whether the courts were not going too far in giving any efficacy to parol agreements concerning land. In *Ebert vs. Wood*, 1 *Binney 218* (decided in 1807) Tilghman, C. J., says: "Whether the courts of chancery have gone further than they ought in thus giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to enquire, because the principles I have mentioned have been adopted by the court, and long considered the law of the land; and to question them now would shake many titles acquired under their authority." Prior to the enactment of the statute, the rules established by the courts of Great Britain had been adopted as part of the jurisprudence of the State, and afterwards it was found impracticable to materially modify these rules, but the courts have always opposed any extention of their application. A learned discussion of the policy governing the conrts of Pennsylvania in cases of this kind may be found in the opinion of Gibson, C. J., in *Pugh vs. Good*, 3

Watts & S. 56. In the case under discussion the land embraced in the parol sale consisted of two parcels, which did not, however, adjoin each other; one being a house and lot in town, and the other a small tract of 8 or 10 acres outside of and adjoining the town. The court held that the delivery of one of the parcels did not take the case out of the statute. The reasons given, however, are significant. The court says: It appears to me that we have gone rather too far already in deciding that a delivery of the possession of the whole of the land, in pursuance of the parol contract, where it forms but one entire subject matter of the same, was a sufficient part execution of it to take the case out of the operation of the act. If this be so, we certainly ought not to go a single jot farther."

"In a few of the States, either on account of a strict construction put upon the language of their statutes of frauds, or by reason of the limited jurisdiction in equity conferred upon these courts, the doctrine of part performance has been wholly rejected, or is applied only to a partial extent and under very special circumstances. In Massachusetts the courts long had the power of enforcing written contracts alone; but by recent legislation their equitable jurisdiction has been enlarged so as to embrace some cases at least of parol agreements which have been part performed. In Maine, also, the equity powers of the courts are restricted to the enforcement of written contracts. In North Carolina the equitable doctrine of part performance has never been admitted, and in case of a verbal contract, even if it be admitted by the defendant, provided he claims the benefit of the statute, the remedy of specific execution is refused. The rule that parol contracts which have been part performed, may be specifically enforced, has also been repudiated in Tennessee as being wholly inconsistent with the statute of frauds; and is only admitted in Kentucky under special circumstances of hardship or injustice to the purchaser." *Pomeroy on Spec. Perf. Sec. 97.*

Miller vs. Ball, 64 N. Y. 286, was an action to compel specific performance of a verbal agreement for the sale of land. The land in question was situated about 2½ miles from a highway in one direction, and about 5 miles in another, and was a wild, uncultivated tract, part of a large tract of timber land. The plaintiff, by consent of owners of adjoining lands, made a road from a public highway to the land; made roads upon the land; underbrushed and cut up fallen trees preparatory to clearing about a quarter of an acre; built a bough shanty; annually cut and drew from the land wood and timber; and paid the taxes thereon. The court enforced specific performance upon the ground that it would be fraud on the part of the defendant to refuse to execute the agreement after a part performance thereof by the other party, when the other party could not be placed in the same situation that he was in before such part performance. "Taking possession," says the court, "under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be re-

called so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute." The court further considers that in the case of a parol agreement, there is an implied agreement that the vendee may at once enter and take possession of the land, and that he is thereupon considered in equity the owner of the land, with the right even to call the vendor to account for any waste committed thereon; that he is the only person interested in the protection of the land against waste or trespass; and that he should have that possession which will enable him to protect his interests. The court held that the acts of the plaintiff upon the land and in building the road thereto, and in paying taxes, must be referred to the agreement for purchase, and that, as it would be impossible to place the plaintiff in his original position, specific performance should be decreed.

Freeman vs. Freeman, 43 N. Y. 34, was an action of ejectment, and the answer set up a claim for specific performance of a parol promise to give the premises in controversy. The premises contained forty acres, then all woodland except about six acres. The defendants entered upon the premises and cleared twelve or fourteen acres, which they fenced and built an addition to the house. They also paid a portion of the taxes assessed on the premises. The court says, "The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. It must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract." The court considered that the same argument would apply to the case of a parol promise to give land, and that expenditures for improvements, made with the knowledge of the promisor, and induced by his promise, constitute in equity a consideration for the promise. Final judgment was rendered in favor of the defendant.

Jones vs. Pease, 21 Wisconsin 644, was an action to compel specific performance of a verbal agreement for the sale of land. The land embraced in the agreement consisted of two distinct pieces, namely, a lot in the village of Lowell and an undivided half of certain mill property. A deed of the lot was given, and the plaintiff entered into possession. Afterwards, the defendant refused to execute a conveyance of the half of the

mill property. The court says, "The parol agreement is for the sale and conveyance of different parcels of real estate and an interest in personal property, for the sum of eight thousand dollars. Are part payment of the purchase money, and the conveyance of part of the real estate, and possession thereof under the contract and deed, sufficient part performance to take parol agreement out of the statute of frauds? It is obvious that the contract must be enforced entire or rescinded. * * * It is however, contended by the appellant that the contract is not taken out of the statute unless possession is delivered to the purchaser under the contract, of *all* the real estate. It appears to us that this position is untenable. As we said before, the contract must as a whole be enforced, or entirely rescinded; and we see less difficulty in fully carrying into effect the agreement of the parties, than in undoing what they have done. And we do not think, when a party agrees by parol to convey different parcels of land, that possession of each parcel under the contract is necessary to take it out of the statute. If it is, then possession may be given of the most valuable portion of the lands, and the purchase money all be paid, and yet the purchaser be turned out of possession of the very lands he has taken possession of under the contract, by an action of ejectment, and compelled to pay for their use and occupation, and be left to an action at law to recover the purchase money paid." The court approves the ruling in *Smith vs. Underdunck, 1 Sandf. Ch. 579.*

The cases of *Savage vs. Carroll, 1 Ball & B. 265*, and *Sutherland vs. Briggs, 1 Hare 26*, already referred to, are cases where possession was taken of but part of the land.

The facts upon which the plaintiff relies for relief in this case are wholly undisputed. The proof of the contract is as clear as it could possibly be if it were in writing. The sole defence which can be relied upon as against the contract, is the technical one that the contract does not comply with the statute of frauds. There is no doubt that the defendant may rely upon this defence if it thinks fit, but the clear and unquestioned proof of the contract relieves the case from complications which might arise if the terms of the contract were in dispute. Knowing the precise terms of the contract, we are able to distinctly apply the acts of part performance and show the scope of their purpose. From a consideration of these acts it is obvious that a gross fraud will be perpetrated upon the plaintiff unless he is granted the relief which he now seeks. He relies not only upon the fact of possession, but upon his labors and expenditures in direct performance of the terms of the contract. The fact of possession is always to be measured and judged by the character and dimensions of the scheme contemplated by the parties in entering into the contract. The circumstances of this case forbade an immediate, actual possession of all the land sold. The tract was large, wild, and uncultivated. It was inaccessible, remote, and destitute of inhabitants. The very scheme of the sale was

the mutual advantage of the parties in opening up this remote region to settlement, and by the encouragement of immigration, enhancing the value alike of these lands and of other lands lying in the same neighborhood and within the land grant of the defendant. The possession which was in fact taken, was the only possession which circumstances rendered possible, and was the only possession which the contract contemplated. And it was a possession entirely exclusive. Taking possession, for purposes of residence and cultivation, of a small tract of land, all of which is visible to the eye, is no more exclusive, in the sense of being such part performance as will in equity take the case out of the statute, than is the taking possession of 50,000 acres as designated by a map of its boundaries. Possession of part of the land sold must always, in the case of a large tract, be equivalent to possession of the whole; for, in the nature of things, no possession can, of itself, clearly indicate the boundaries of the land possessed.

So, in respect to the labor and expenditures, although it was not practicable and not in accordance with the scheme of the contract that they should appear obviously in respect to each parcel of the land sold, they were nevertheless clearly directed to the performance of the contract with a view to the general advantage of all the land. Suppose that, instead of conveying nearly all the land, the defendant had in fact conveyed none, or only a small portion of it. The defence which is now set up could in such case be maintained with equal force, and the effect of it, if successful, would be practically to rob the plaintiff of the advantages accruing to him from his time, labor and expenditures in pursuance of and in reliance upon the contract. A further effect would be to reward the defendant for his fraud and wrong by placing it in the ownership and possession of all the improvements made by the plaintiff and of all the advantages which had been wrought by his labor and expenditures. The only difference between the supposed and actual case lies in the comparative enormity of the fraud. The quality of the fraud is the same in both cases. The various acts done by the plaintiff cannot be undone. In no way can he be placed in his original position. The land, which was desolate at the time of the contract, is now a center of settlement, where some hundreds of persons have established their homes. The intelligent labor and industry of the plaintiff, directed to the carrying out of the terms of the contract, are facts of the past whose value cannot now be even approximately estimated. There is no possibility of an adequate compensation in damages to the plaintiff for the wrong which has been put upon him. The only relief which can in justice be given him is the relief by specific performance, which he now asks.

Much of the land embraced in the contract has, as we have seen, already been conveyed to the plaintiff. In other words, the defendant has to a large extent recognized and performed the contract by conveyance from time to time of parcels of the land. It is a significant fact in this connection that the payments made by the plaintiff were made upon the

whole contract, and that the particular parcels of land conveyed were selected by the defendant. This of itself is sufficient to indicate the entire and inseparable character of the contract.

The effect of a failure to grant the relief demanded in this case, would be not only to justify the fraud and wrong to which we have referred, but to compel the plaintiff to accept a condition of affairs which he never contemplated, and be party to a contract which he never made. It having been seen that the plaintiff cannot be restored to his original position, and that he cannot be adequately compensated in damages for the breach of contract, seems almost superfluous to add that he should not be compelled to content himself with the land which the defendant has already conveyed. The contract being entire and inseparable, the justice of the case requires that it be enforced to the full extent and in all its particulars; and it is with a view to such complete performance that courts of equity admit parol evidence of the contract. No court has ever required a purchases of land to accept a conveyance of part. If the vendor's title fails, or if for any reason full performance by the vendor becomes impracticable, the court permits the purchaser, at his option, to accept such portion of the land as the vendor may be able to convey, and compensation in respect to such portion as cannot be conveyed. But such course is never compelled. If the vendor cannot fully perform, the purchaser, is, at his option, always fully absolved from his obligation to purchase any part of the land. If the contract cannot be fully performed, the court will not require either party to accept part performance. Now, in this case, there being an irrevocable part performance, the only just course, in order to prevent gross fraud, is to compel the complete and perfect performance of the contract according to its terms.

JNO. G. WOOLLEY,
Solicitor for Plaintiff.

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

SANFORD S. SMALL, Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Appellee.

No. 226.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR APPELLEE.

W. P. CLOUGH,
A. H. GARLAND,
H. J. MAY,
Counsel for Appellee.

PRESS OF THOMAS McGILL & CO.

IN THE

Supreme Court of the United States.

October Term, 1889.

SANFORD S. SMALL, Appellant, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, Appellee.	No. 226.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR APPELLEE.

The appellant filed his bill of complaint against the appellee in a State District Court, for the specific performance of a verbal contract for the sale of quite a quantity of lands particularly described and set forth in the bill (*Rec., called Paper Book, p. 7 et seq*). Appellee appeared and answered, and on its petition, the case was removed to the Circuit Court of the United States, where it was determined, in June, 1884, in favor of appellee, and Small appealed to this Court (*Rec., 42–3*).

The answer of the appellee is short, and is in these words (Rec., 18):

"The defendant, for answer to the complaint of the plaintiff, admits that it conveyed to the defendant, or to the said Steele, the lands described in the complaint from folio twelve (12) to folio thirty-one (31), inclusive; and that payments were made to the defendant, for and on account of the lands so conveyed, to the amounts stated in the said portion of the complaint. The defendant further admits that it has not conveyed, and that it is not willing to convey to the plaintiff any part of the lands described in folios forty-four (44) and forty-five (45) of the complaint.

"Further answering, the defendant denies each and every allegation in the complaint contained, save the allegation of the defendant's corporate existence, and save the allegation of ownership by the defendant of the lands described in the complaint, and save as hereinbefore expressly admitted; and the defendant further denies that the plaintiff has suffered any damage whatever by reason of the defendant not having conveyed to the plaintiff the lands described in folios numbered forty-four and forty-five (44 and 45) of the complaint. Wherefore," &c.

Upon these pleadings, and some depositions (*Rec., 21–42*) to be noticed more specifically hereinafter, the case was heard.

The decree of the Court below was certainly correct in denying Small the relief sought, for the reason, among others, that the alleged contract on which his claim is founded, was verbal. The negotiations between the appellant and James B. Power, the appellee's land commissioner, relied on in this suit, occurred within the State of Minnesota. The land forming the subject of those negotiations lies in the Territory of Dakota. If any material difference between the laws of the two jurisdictions governing such transactions existed, it might become a question as to which rule of law should prevail;

but the statute of Minnesota and that of Dakota, governing contracts for the sale of real estate, are substantially similar. Both statutes declare invalid verbal contracts for the sale of real property. The Minnesota statute, however, adopts in express terms the established equity rule upon the subject of part performance of parol contracts, for the sale of real property, while the Dakota statute is silent upon the subject; but the Courts of Dakota Territory are invested with equity powers, and hence, what the Legislature has expressed in Minnesota, must necessarily be inferred to be the rule in Dakota.

That clause of the Minnesota statute relating to part performance reads thus:

"SECTION 13.—Nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements."

Stats. Minn., 1878, p. 43.

The Legislature did not, by thus expressly adopting the equity rule, mean to enlarge that rule. The terms used are those which have long been well understood in chancery practice, and if this section had been omitted from the statute, the rule in Minnesota upon the subject would have been precisely the same as it now is.

The Courts of that State have frequently had the subject before them, and in no instance can any expression be found indicating any understanding on the part of the Court that anything is to be regarded as part performance under the statute which would not have been so regarded in the absence of the statute. Whenever the Courts of that State have relieved against parol contracts for the sale of real estate, on the ground of part performance, the nature of the case has always been such as to bring it within the well-established principles of equity jurisprudence upon this point. Thus, in the case of *Gill*

v. *Newell, 13 Minn., 463*, the vendee had entered into possession and made valuable improvements upon the property.

In *Place* v. *Johnson, 20 Ib., 219*, the facts were similar, as they were also in the case of the *Stillwater & St. Paul R. R. Co., 23 Ib., 343.*

In *Lanz* v. *McLaughlin, 14 Minn., 72* the Court held, that payment of the purchase-money without taking possession would not constitute such part performance as to entitle the vendee to specific enforcement of the contract, in this language:

"There was no performance, or part performance, by the respondent such as would take a parol contract out of the statute. The respondent did not enter into possession, and certainly neither the deposit of the price with the respondent's agents in Chicago, nor the notice of such deposit sent to the appellant, nor the respondent's readiness to pay it over upon the delivery of a deed, would constitute performance, or part performance, entitling the respondent to enforce a conveyance. The doctrine now generally accepted is, that not even the payment of a purchase price, without something more, will constitute such part performance as will take a case out of the statute." (See page 76.)

In the very recent case, *Townsend* v. *Fenton, 30 Minn, 538*, that Court again declared similar principles, viz.:

"The sufficiency of the complaint depends upon whether there was a part performance of the oral agreement set forth in it such as takes it out of the operation of the statute of frauds. It is now well settled that payment of the purchase-money is not generally 'enough for this purpose.'" (*Pom. Con,. sec. 112*, and authorities in note, and sections 113 and 114; *Waterman on Specific Performance, secs. 262 and 269; Frye on Specific Performance, sec. 403.*)

"Where specific performance of such agreements is decreed, notwithstanding the statute, it is on the ground that otherwise the statute would be made the means of committing a fraud, and the reason why payment, in

whole or in part, will not, where it is in money, be deemed sufficient to take the case out of the statute, is, that the party having an adequate remedy by action, to recover back money, withholding performance, will not operate as a fraud." (See page 531.)

As the contract alleged in this case was confessedly verbal, it is presumptively invalid; hence, the burden is on the plaintiff to prove circumstances bringing it within the exception to the general rule; but no such circumstances have been shown. The species of acts which will constitute part performance within the equity rule are perfectly well established. They are all reducible to the single ground mentioned by the Supreme Court of the State of Minnesota in the passage first above quoted, to wit: that the enforcement of the statute would permit the vendor to wrongfully obtain something from the vendee, or to wrongfully withhold from him something already obtained, without consideration, and in violation of good conscience. (See *Waterman sup., sec. 360 et seq.; 3 Parsons Cont., 342–355, 7 Ed.*) But no such state of things exists in this case. The lands forming the subject of the negotiations here are not in one body, but are composed of many separate and distinct parcels. They are made up of odd-numbered sections, or parts of odd-numbered sections, in four congressional townships. Each section is therefore a physically distinct and separate body from all the remainder of the land. The price to be paid was not a *gross* sum, but so much per acre. The appellant says the price was to be $2.50 per acre, except in town 144, range 56, which was to be $2.75 per acre. (*Rec., 21.*) The witness Power, the other sole participant in the negotiations, says the price was to be from $2.50 to $2.75 per acre, and that some might have been $3.00 per acre. (*Rec., 38.*)

For the purposes of this discussion, it is not material which of these witnesses was correct. The statements

of both concur upon the point that the price was not a *gross* price, but an *acre* price. Hence, instead of the price being a *gross* one for the whole quantity of lands sold, it was in reality distributed between the various tracts of land, so that the price of each separate section and subdivision formed a distinct sum by itself. The price for any section could be ascertained by multiplying the area thereof by the rate per acre. This is important to be borne in mind; for, in one sense, it may be regarded the turning point in the case. Furthermore, in practice, the parties treated the arrangement as separable. Payments were not applied upon the contract generally, but were always applied to specific parcels, and when any such application was made at all, it was carried to the extent of payment in full for the tract upon which the application was made. This practice was described by the witness (Power), as follows:

Question. You may now state what was done between yourself, as land commissioner of the defendant, and the plaintiff, subsequently to the making of this agreement, which you have testified about relative to the making of payments upon these lands, and the conveying by deed from the defendant to the plaintiff.

Answer. It was simply as he brought us the preferred stock I wrote up certificates of sale for the area that would be covered by that payment of stock. That was done from time to time as the preferred stock was brought in.

Q. Who selected out of the whole body of land which had been included in this original agreement, the particular descriptions which were so from time to time inserted in these certificates?

A. I made these designations, except it might have been in some particular cases. Mr. Small selected some particular tract which he had sold. It was understood that I should make the selections generally. It was sometimes difficult to fit an exact amount of stock with a specified area, and I often had large amounts of stock until balances

could be procured to make payment for a given area. We never divided a government subdivision.

Q. Upon those certificates so given by you, the plaintiff procured deeds from the company of such lands as were deeded to him?

A. Yes, sir.

Q. What was the course of business in sending forward those certificates and procuring the deeds. How was it done, and from whom were the deeds issued?

A. The certificates of sales were given to the purchaser. The report of all sales made monthly to the board of directors. The deeds written in my office sent forward with the statements that payments were made on the particular sales which the deeds represented; they were then signed by the president, countersigned by the secretary and returned to me for delivery, and I delivered them to the purchaser—to the plaintiff in this particular case. (*Rec., 34.*)

The following propositions are, then, true:

First. Every tract upon which any payment has been made, or upon which any valuable improvement has been put, or of which possession has ever been taken by Small, has long ago been conveyed to him by the company.

Second. Upon none of the tracts for which he now sues has he made any payment, or put any improvement, and he has not taken possession of any of them.

Therefore, the refusal by the appellee to make conveyance of these parcels will not deprive the appellant of anything whatever. Nor will it render him liable to any action for unlawful occupation. Hence, nothing that has ever been recognized by a Court of Equity as part performance exists in this case. The appellant will lose nothing and will be made liable for nothing by the conduct of the appellee. He will be hurt in no way whatever by the refusal of the company to make conveyance

of the remainder of the lands, unless it be the supposed profits on those very lands themselves.

The only reason having the least appearance of argument; which can be urged in favor of the case made, is his: that as he has taken possession of, and made improvements on, and payments for, and received conveyances of some of the tracts covered by the arrangement, those things constitute such part performance as to take the case out of the statute of frauds, but upon the facts disclosed the authorities do not sustain this view.

It seems three cases have thus far been reported in this country, in which the question whether taking possession of one of several tracts forming the subject of a parol sale of lands will take such tract out of the statute as well as the other tracts of which possession has not been taken. Those cases are *Smith* v. *Underdunck, 1 Sanf., ch. 579; in the matter of Allen's estate, 1 W. & S., 383; Jones* v. *Pease, 21 Wis., 644.*

In *Smith* v. *Underdunck*, one James Underdunck, being the owner of an undivided interest in certain mills, and the owner in severalty of a tract of three hundred acres of land, agreed by parol to sell and convey the same to one Miles Smith, for the *gross* price of $5,300. Afterwards, the entire purchase-money was paid, and a conveyance was made of the mills. The three hundred acres of land were not conveyed, and this suit was brought to enforce the conveyance thereof.

The Assistant Vice-Chancellor of the State of New York, before whom the case was heard, granted the relief asked for, and directed a conveyance of the lands.

In the case of Allen's estate, Allen, in his lifetime, entered into a parol contract with one George Jacobs, for the sale to him, for the *gross* price of $800, of a house and lot and eight or ten acres of land. Jacobs entered into possession of the land, but not of the house and lot. A portion of the purchase-money was paid, but the

property was not conveyed, and a question arose in the settlement of Allen's estate, as to whether the transaction had converted the property into personalty, or whether it remained realty and descended to Allen's heirs. In order to decide this question, it became necessary to determine whether or not the contract for sale was valid and binding, and this question in turn depended upon the effect of the taking possession by Jacobs of one of the parcels of property. If this act of the vendee constituted such part performance as took the case out of the statute of frauds, then the contract was enforceable, but otherwise not; and the Court held, after an extended discussion, both upon principle and authority, that the case was controlled by the statute, and hence the contract was invalid.

In *Jones* v. *Pease*, the latter being the owner of a grist mill and water power, and a certain other lot in the Gave village, and also of a team of horses, wagon, sleigh, and harness, entered into a parol contract with Jones, whereby he agreed to convey to the latter the said village lot in severalty, and an undivided half of all the rest of the property, for the gross price of $8,000, $1,000 of which sum was to be paid by the conveyance to Pease of other lands, the property of Jones. Jones conveyed his land to Pease and went into possession of the said village lot. Upon subsequent refusal of Pease to complete the arrangement by executing deeds of conveyance, this suit was brought, and the Court decreed the case a proper one for specific performance.

The state of the precedents, therefore, is this: Three cases have occurred in which a parol contract to sell two or more parcels of land for a *gross* price, and in which possession has been taken of one of them, have been before the Courts for consideration. The Assistant Vice-Chancellor of New York and the Supreme Court of Wisconsin have decided in one way, and the Supreme Court

of the State of Pennsylvania has decided the opposite. Let it be conceded for the moment that the Assistant Vice-Chancellor of New York and the Supreme Court of Wisconsin were right, and the Supreme Court of Pennsylvania wrong, but what was decided? Merely that when the price is *gross*, and, hence, inseparable, and possession has been taken of part, the contract will be enforced as to the remainder. But the reason of this doctrine is perfectly apparent, and constitutes the difference between those cases and the one at bar. Possession having been taken, if the contract failed entirely, the vendee would be turned out and become the subject of an action for unlawful occupation. But the contract could not be executed as to the parcel taken into possession without being executed as to the other parcel, because one price covered all. The parties had not made any apportionment of the price, and the Court could not do it for them. And, furthermore, general payments upon the whole price had been made in each case; in one of them by the conveyance of real estate which, of course, could not be recovered. If different prices had been placed upon the different parcels by the parties themselves, so that the price of the tract taken into possession could be ascertained and paid, it is not conceived that those Courts would have gone farther than to deal with such parcel alone. Those decisions establish the doctrine which they laid down only in cases of a *gross* price. This has been the understanding of the text writers, and the rule is laid down by the recent writers in that way. For instance, *Pomeroy, Specific Performance, section 122*, announces the rule in these words:

"Where several distinct parcels are sold to the same vendee, by one entire contract, and for a *gross* price, the rule, as generally adopted, makes the proper possession of one parcel a sufficient part performance as to all."

Waterman, Spec. Perf., sec. 376, says:

"The taking of possession of one of several parcels of land embraced in a parol agreement, and agreed to be sold for a *gross* sum, would be sufficient."

In the case at bar, the statute of frauds can be preserved without inflicting any loss whatever upon the vendee, Small, unless it may be, as before remarked, that of supposed profits upon the unconveyed lands.

The position here assumed is sustained by the authorities to the fullest extent:

3 Parsons, sup., where most of them are cited; and
Lester v. *Foxcroft, L'd'g Cases Eq., W. & T., vol. 1, pt. 11, p. 1027 et seq., and notes.*
Adams Eq., 3 Am. Ed'n., 86 et seq.

But the reasoning of the Court below on the law of the case is so conclusive, and its finding of facts so clear and just, nothing more can be needed before this Court.

20 Feb. Rep., 753, &c.

No fraud was perpetrated on S., no harm was done him, as he received deeds for all the lands he paid for; and the very essence of his right to maintain this suit is, that he has been defrauded, wronged and damaged.

To test this, look for a moment as to what mutuality is there in this undertaking! How could the company proceed to compel Small to execute his part of the contract remaining unperformed? The question answers itself; then he cannot have this remedy himself.

Adams' Eq., sup., 82, and note 2.

Very respectfully,

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